IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 273

RUSSELL SCOFIELD, LAWRENCE HANSEN, EMIL STEFANEC, and GEORGE KOZBIEL, -Petitioners,

NATIONAL LABOR RELATIONS BOARD and INTERNATIONAL UNION, UAW-AFL-CIO,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

Proceedings Before the National Labor Relations Board:

5.18.61 Charges filed with the Board.

12.1.61 Order consolidating cases, consolidated complaint & notice of consolidated hearing dated

12.11.61 Amended order consolidating cases, amended consolidated complaint and notice of consolidated hearing dated

12.21.61 Answer to complaint received

1.9.62 Hearing opened

1.12.62 Hearing closed

1.22.62 Union's motion to reopen the hearing for purpose of receiving exhibit, dated

2.23.62 Trial Examiner's order receiving posthearing exhibit,

6.7.62 Trial Examiner A. Norman Somers' Intermediate Report and Recommended Order issued

9.4.62 Petitioners' exceptions to the Intermediate Report received

9.4.62 Petitioners' request for oral argument received (No formal action taken)

9.5.62 General Counsel's exceptions to the Intermediate Report received

1.17.64 Decision and Order issued by the National Labor Board, dated

3.23:64 Petitioners' motion for reconsideration received

5.18.64 Board's order denying Petitioners' motion, dated

Proceedings in the Court of Appeals for the Seventh Circuit and the Supreme Court of the United States:

6.26.64 Petition for review filed

9.15.64 Petition of union to intervene filed

9.16.64 Order denying petition to intervene dated

11.12.64 Union petition for writ of certiorari relating to intervention issue filed in Supreme Court

1.18.65 Order granting petition for writ of certiorari dated

12:7.65 Decision of Supreme Court permitting union to intervene issued

10.26.67 Intervenor's motion for summary dismissal filed

11.8.67 Order denying intervenor's motion for summary dismissal, dated

1.17.68 Oral argument in Court of Appeals

3.5.68 Opinion and order of Court of Appeals filed

4.3.68 Board's proposed decree served upon parties

4.16.68 Decree of Court of Appeals entered

7.6.68 Petition for writ of certiorari docketed in Supreme Court 10.14.68 Order granting petition for writ of certiorari, issued

¹Petitioners herein were Charging Parties before the Board.

EXCERPTS FROM TRANSCRIPT OF TESTIMONY

[1] BEFORE THE NATIONAL LABOR RELATIONS BOARD THIRTEENTH REGION

In the Matter of:

LOCAL 283, UNITED AUTOMOBILE, AIRCRAFT AND AGRICULTURAL IMPLEMENT WORKERS OF AMER-ICA, UAW-AFL-CIO (WISCONSIN, MOTOR CORPORATION)

and

RUSSELL SCOFIELD, an individual LAWRENCE HANSEN, an individual EMIL STEFANEC, an individual GEORGE KOZBIEL, an individual

Case Nos. 13-CB-1059-1 13-CB-1059-2 13-CB-1059-3 13-CB-1059-4

YMCA New Central Branch 915 West Wisconsin Avenue Milwaukee, Wisconsin Tuesday, January 9, 1962

The above-entitled matter came on for hearing, pursuant to notice, at 1:30 o'clock p.m.

BEFORE:

A. Norman Somers, Esq., Trial Examiner.

APPEARANCES:

Benjamin K. Blackburn, Esq. and Lawrence F. Doppelt, Esq., 176 West Adams Street, Chicago, Illinois, appearing on behalf of the Counsel for the General Counsel.

Max Raskin, Esq. and Herbert S. Bratt, Esq.; 606 West Wisconsin Avenue, Milwaukee, Wisconsin, appearing on behalf of Local 283, Respondent. [1A] Lowell Goerlich, Esq., 1126-16th Street, N. W., Washington, D. C., appearing on behalf of Local 283, Respondent.

Karcher & Zahn by Edward J. Zahn, Jr., Esq., 438½ Pine Street, Burlington, Wisconsin, appearing on behalf of Russell Scofield et al., Complainants.

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PETER ZAGORSKI

was called as a witness by the General Counsel pursuant to Rule 43 (b) and, having been first duly sworn, was examined and testified as follows:

Direct Examination.

- [46] Q. (By Mr. Blackburn) Mr. Zagorski, do you know how production ceilings came into existence at Wisconsin Motor Corporation? A. Yes.
- Q. Did they come into existence in 1944? A. To this o degree of making resolutions, making by-laws; but it was a gentleman agreement dating back to 1938 which today some of the members of the board are today holding highly respected positions in Wisconsin Motor Corporation personnel.
- [52] Q. (By Mr. Blackburn) I think I can restate it. Let me try. When you came back from service in January, '46, what was the status of production ceilings of Wisconsin Motor? A. There was resolution made by the membership.
- Q. Of the union? [53] A. Of the union stating that X number of dollars was considered a fair day's work to provide jobs for more people.

Trial Examiner: Is that dollars or hours?

The Witness: Dollars per hours.

[56] Q. (By Mr. Blackburn) Now, back to January, 1946, when you came back from service, Mr. Zagorski, was the union doing anything to enforce this motion? A. Yes.

Q. What was it doing at that time? A. We would sometimes once a year, twice a year, take a general check. By that I mean we would go to the Wisconsin Motor management and ask them for a duplicate copy of a given day of everybody's work cards.

Q. , A day picked at random? A. That we picked; that

the union picked at random.

Q. All right, A. The company then could give us a duplicate copy of all employees working that particular day.

Q. Did you tell the company what you wanted the cards for? A. Yes.

[58] Q. All right. Go ahead. I'm sorry I interrupted you.

A. We would then give these cards to their respective stewards in their areas because they would know the machines, they would know the classification these machines were in and we posted around the plant including the timekeeper's office what was day rate, what was machine rate, and what was ceiling, and by virtue of the figures posted around, the stewards themselves would check against the machine, against the classification this machine was in and see if they were within the request of the union production ceiling.

Q. When you say we posted, you mean the union posted?

A. The union, that's right. Those people that were over the ceiling were then called to a meeting and we would ask how this occurred.

Q. Now, you say called to a meeting. Is this a union meeting? A. No, it was by a trial committee.

Q. Of the union? A. Of the union. The trial committee consisted of executive board members. We'd have not more than five, not less than three present.

Q. Did company officials participate in these meetings of the trial committee? [59] A. No; but they knew it was going on.

Q. But they weren't there? A. No.

Q. How did they know it was going on? A. Because it was held in the cafeteria of the company.

Q. Now, what periods specifically are you talking about now? A. All the time to sometime I believe in '57 or '58 when the company told us we no longer, I was not president at that time; but I read the minutes and the company at that time took a position that they would not allow the union to hold these hearings on company property.

Q. Let me see if I understand you, Mr. Zagorski. You are testifying that from January '46 until sometime in 1956 or '57 the union trial committee regularly met in the company

cafeteria to hold these trials, were they? A. Yes.

Q. And you say they met regularly during that period?

A. I would say once or twice a year until such time as the people that were found guilty would have been heard and tried. Sometimes it took a day.

- Q. Once or twice every year from '46 to '57? A. That's correct.
- Q. In '46 where was the union's office located? A. It was opposite side of the employment office.
- Q. In the plant? [60] A. In the Wisconsin Motor Corporation plant one.
- [61] Q. Well, during the years that you had the—your office in the plant, didn't you have some of these trial hearings in your office? A. Yes.
- Q. Did you hold them in the cafeteria, did you ever hold them in the cafeteria when you had an office in the plant? A. I would say yes.

Q. You recall that specifically? A. Yes, yes.

Q. Well, how often would you hold them in the cafeteria and how often would you hold them in the office? A. It all depends on how many people we had to appear.

Q. Well, how big was your office? A. Oh, gosh, about

eight by eight, eight by seven, eight by eight.

Q. And you said the trial committee would consist of three to five members of the executive board? A. Yes.

Q. How would you conduct these trials; would you call the ceiling violator in one at a time? A. That is correct.

Q. So the maximum number of people you'd have at a hearing [62] would be five on the committee and one, six?

A. Well, we had an understanding with the company we would not call down more than one. This way they would not lose so much production hours.

Q. But it would be six would be about the most people who would be present at one of these things? A. I would say

four or five.

Q. The violator who was called before the trial committee, he didn't bring counsel with him or anything like that, did he? A. No, because we supplied him with his records that we received from the company.

Q. And the union didn't have a prosecutor or any official like that in there to present its case to this trial committee,

did it? A. No.

Q. It's a trial committee and the workmen would come in and you'd have the meeting that way, if I understand it? A. That is correct.

Trial Examiner: You were talking about having the trials take place individually for each alleged violator of the ceiling restriction. In order not to take too many men away from their work. Did I understand that the trials were held on company time?

The Witness: That is correct.

Q. (By Mr. Blackburn) Once again, Mr. Zagorski, I have [63] interrupted you. You were telling me how this enforcement worked and we'd gotten to the point where you said you had these hearings and I think it's pretty clear now that the trial committee would call the violator in. Suppose you take it up from that point. What happened at these hearings? A. Well again I say we were careful so that we did not take too many people at one time and we also worked in the system of one department close to another so that these people wouldn't lose too much time leaving their jobs and coming down for this hearing. At one time we were told by Mr. Wurtz that we were losing, the people were losing too much time through this hearings and we'd have to leave and we'd have to hold

them elsewhere. Then we told Mr. Wurtz and the company that if they wanted key machines down longer than was necessary then we would do that and after a meeting on that basis we again were allowed to have these hearings back in the plant.

- Q. Well, you have wandered a little afield from what I was trying to get into, Mr. Zagorski. I'll come back to this point in just a minute. What I want to clear up for the record at this point is what the union would do to ceiling violators when it called them in before this trial committee. A. We would show them the cards and ask them if this card was his. if it was accurate and what explanation he had for going over ceiling, ask him if he believed in it and ask him what reason. he had for it. We would then would judge on the [64] merits of his answers and to see the amount. In many cases we'd see the fellow didn't have no violations for say many years prior to the time he was called. We would fine him \$1.00 to \$5.00 and we'd waive the fine in saying that because of his record being clean that we would not fine him at this time but if it occurred again the fine that we waived would be added to whatever fine was given to him on the second offense.
- Q. You say the fine was \$1.00 up to \$5.00, do I understand you? A. Yes.
- Q. You would pick the amount of the fine based on how serious the violation was or something like that, I presume; is that correct? A. (Witness nodding in the affirmative.)
- Q. Now, in some cases I take it you didn't waive the fine, you did fine the man and collect the fine from him?

 A. That is correct.

[74] Mr. Blackburn: In an off-the-record discussion among counsel and the Trial Examiner, the following stipulation was arrived at: It is stipulated that a resolution was adopted by the membership of Local 283 in December, 1955, which was subsequently amended twice so that by December, 13, 1958, the [75] resolution read as it appears on General Counsel's Exhibit 13. Those two amendments

which took place between 1955 and 1958 changed Section 3, changed the wording of Section 3 from "persistent and flagrant violations" to "persistent and/or flagrant violations" and the other amendment changed the number of the article of the constitution referred to from some number other than 30 to Article 30 as it appears in General Counsel's Exhibit 13. In February, 1961, the what had been previously a resolution of the membership of Local 283 was adopted as a by-law of Local 283 and that by-law appears in General Counsel's Exhibit 14 which has previously been erroneously described in this record as a copy of the resolution as it existed in December—on December 3, 1955. The notation in ink on General Counsel's Exhibit 14; 12-3-55 has no significance.

- [95] Q. (By Mr. Blackburn) Mr. Zagorski, I understand there was a strike at Wisconsin Motor by Local 283 in 1956; is that correct? A. That's correct.
- [96] Q. What were the issues that brought about the strike, Mr. Zagorski? A. Oh, it was a waiver clause. It was time paid by the company for union activity time and the ceiling.
- Q. And what position did the company take as to production ceilings prior to the strike? A. They wanted the ceiling raised.
- Q. Didn't they ask that the ceilings be eliminated completely? A. Not to my recollection.
- Q. And what was done about the ceilings when the strike was over? A. The company said that they would give us a lot of inequities if we would raise the ceiling ten cents.
- Q. The company would give you a lot of— A. Inequities; monetary issues.
- Q. What do you mean by that, sir? I don't understand yoù.

Mr. Raskin: Corrections of inequities.

[97] The Witness: Yes.

Q. (By Mr. Blackburn) What sort of inequities are you referring to? A. Day work was in various classifications. They got up to seventeen cents an hour, received two and a half per cent or six cents, whichever was the greater, received a better vacation and in all it was monetary issues like I say, involved money; but this was all based on providing we raised the ceiling ten cents.

[109] Mr. Blackburn: I think it would be helpful to have it in the record. Would you mark these General Counsel's Exhibit 24 for identification.

(The document above-referred to was marked General Counsel's Exhibit No. 24 for identification.)

Q. (By Mr. Blackburn) Mr. Zagorski, I hand you a piece of [110] paper that's been marked General Counsel's Exhibit 24 for identification.

Mr. Blackburn: And I assume, Mr. Raskin, we can put this in by stipulation as being whatever Mr. Zagorski describes it as?

Mr. Raskin: Yes.

Mr. Blackburn: Fine.

- Q. Can you tell us what that is, Mr. Zagorski? A. This is the five labor grades we have now in the Wisconsin Motor Corporation plant. Describes what the day rate is in each classification, the machine rate, ceiling per how, ceiling per eighthours.
- [111] Q. (By Mr. Blackburn) Mr. Zagorski, how are the figures in the ceiling per hour column arrived at? A. Classification of job, price of job, through the course of many years in established agreement between all concerned.
- Q. Taking grade one just as an example, who decided that the number under ceiling per hour for grade one would be \$2.90? A. The company and the union.

- Q. How? A. By contract negotiations.
- Q. When? A. Through the course of years.
- Q. Well, this particular figure, when was this one arrived at? [112] A. Just a total of all the commitments made through negotiations through the course of years.
- Q. Do I understand you to mean that this figure has been increased from time to time? A. That is correct.
- Q. In the course of the years and has eventually arrived at \$2.90 where it now stands; is that correct? A. That is correct.
- Q. How did you arrive at the figure ceiling for eight hours? Is that just multiplying the figure ceiling per hour by eight, I presume? A. That is correct.
- [114] Q. (By Mr. Blackburn) Mr. Zagorski, substituting in Mr. Somer's question the three hours that he's specified, assume that the particular employee can earn \$23.20, taking the grade one ceiling for eight hours figure, can earn that in seven hours. Just assume this for the moment. Is that employee then free to leave the plant at that time? [115] A. Of course not.
- Q. Does he stop working at that time? A. Not necessarily.
- Q. The material that he produces over the \$23.20 that day, what happens to the parts that he turns out? A. They go just like any other part.
- Q. What happens to the pay that he's entitled to for those parts? A. He then puts his money aside to take care of any trouble, down time which the company would have paid which they don't pay because he puts this time over and beyond to cover up the expense.
- Q. You say he puts the money aside? A. That is correct, the money for the pieces he made.
- Q. He puts the record of those pieces aside? A. As known company wise or in layman language, kitty, or a little bank.
- Q. Bank is the one I am familiar with. Can we call it the bank? A. Yes, sir.

- Q. He holds back the record of the fact that he's made those pieces that day and turns them in on his production some subsequent day, isn't that correct? A. That and also when his machine is broken down which normally the company would have to pay out of their own pockets for [116] the down time which is less than his average earnings which is the ceiling, he then puts in the pieces that he had in the bank and the company does not have to pay any money.
- Q. Let's go back to our assumed worker and our assumed situation. On day one he has managed to produce \$23.20 worth in seven hours and he turns in his production records for that day for that much work so that for that day he will be paid \$23.20. For the last hour of his shift he then continues to produce pieces. These pieces are turned in to the company, it's part of their production for that day; but his record of the fact, his claim for the fact that he is entitled to be paid for those pieces he does not turn in that day; is that correct? A. If he was fortunate enough to make more, yes.
- [117] Q. Let's get back to our specific example. Let's assume this man has only one hour's worth in the bank because we said that he worked the last hour of the day before and didn't turn in his records. So let's assume he had nothing before that day at the end of the first day he had one hour in the bank. The next day he has three hours of down time. Could he then or would he then on day number two report production for one of his three hours down time and be compensated for day rate or machine rate for the other two hours? A. Not necessarily. He could try and overcome the down time [118] providing he had a good enough job, a good enough rate the particular day when the down time occurred.
- Q. He would work harder for the other five hours and maybe make up some of those three hours' time? A. That's right.
- Q. Assume he worked like a beaver, he managed to make up two hours' production, could he or would he then go to day one for the other he had in the bank, take the

two hours that he had managed to make up in the five hours he worked on day two and show production at the ceiling level on day two for the whole eight hour shift?

A. Providing there was the same job running the day prior to it he could if he wanted to.

Q. Does it work this way in practice at Wisconsin Motor? A. Accepted practices, yes.

[120] Trial Examiner: Maybe I don't understand this. If the employee worked at a rate, that it has produced a quantity which would entitle him on a piece work basis to more than the ceiling, so far as the employer is concerned, he can demand payment for the high production that he has achieved. He can ask the employer for payment and the employer will pay it to him. It may be a violation of your resolution; but between him and the employer, he can—or put it this way, if he should ask the employer to reimburse him or to compensate him in accordance with the piece rate standing, the employer will pay it to him.

The Witness: Yes.

Trial Examiner: I see. And this whole, this resolution which is now in the by-laws is an arrangement whereby for the reason that you have previously indicated, you want the employee not to do so.

The Witness: That's right.

Trial Examiner: And if he does so, it's a violation of

The Witness: Resolution.

Trial Examiner: -of the by-law.

[132] Trial Examiner: In other words, you didn't ask him to work more slowly on the machine.

The Witness: Never.

Trial Examiner: Just let him follow his own pace.

[133] The Witness: That's right.

Trial Examiner: And then if he should earn, if the quantity produced entitles him to more than the ceiling rate, he shouldn't do that, he shouldn't claim more than

the ceiling rate but let the excess go into the bank for the use that you described previously in answer to Mr. Blackburn's question.

The Witness: That's right.

Trial Examiner: Is that what you have in mind. And I am interested in how the employer enters into the picture. I would assume you need a certain amount of cooperation from the employer in order to be able to do that.

The Witness: Up to now we had no trouble.

Trial Examiner: When is now, up to February?

The Witness: Well, I say we have no trouble even to this point.

[167]

ARNOLD OLSON

was called as a witness by and on behalf of the General Counsel and, having been first duly sworn, was examined and testified as follows:

Trial Examiner: Mr. Olson having been sworn will be seated. Give your full name and address to the reporter, please.

The Witness: Arnold Olson, 638 North 79th Street, Milwaukee, Wisconsin.

Direct Examination.

- Q. (By Mr. Blackburn) What is your occupation, Mr. Olson? A. Director of industrial relations at Wisconsin Motor.
- [172] Q. (By Mr. Blackburn) Were negotiations for a new contract held in 1959, Mr. Olson? A. No. Yes, there is a complete contract negotiation 1959.

Q. Did you participate in those negotiations as a representative of the company? A. Yes, I did.

Q. What did you say to the union in the course of the 1959 negotiations with respect to production ceilings if anything? A. During the 1959 contract negotiations we requested that the ceilings be increased ten cents.

[181] Q. (By Mr. Blackburn) Mr. Olson, did the union ever ask you to help you enforce production ceilings? A. No, they did not.

- Q. Has the union ever accused you of violating any contracts by letting employees earn more than they can earn under the production ceilings? A. No, they have a never done that.
- Q. Was there any grievance meeting after February 14, 1961, at which Mr. Zagorski or any other union representative on or off [182] the record asked you to enforce production ceilings by stopping employees from earning more? A. No.
- Q. Was there any such grievance meeting at which anything like this happened prior to February 14, 1961? A. No, sir.
- Q. Mr. Olson, does the company let the union see production records upon request? A. Yes, they do.

[184]

Cross-Examination.

[198] Q. Well, you knew that when the union representatives requested the cards, the time cards— A. That's right.

Q.—you knew, did you not, that this was for the purpose of checking any ceiling violations? A. I didn't know exactly what they were used for although I think that we had a pretty good idea that they may have been used for the checking of the ceilings.

Q. Yes. And you knew that at the time the request was made? A. I didn't know exactly what they were going to use them for; but I suspected that that might be one of the reasons.

- Q. Well, this thing of ceiling isn't anything new with you, is it? A. No, it is not, no.
- Q. In fact, it's been in there ever since you came with the company? A. Long before.
 - Q. So it isn't a subject that's foreign? A. No, it is not.
- Q. You didn't have to suspect too much, did you? A. No.

[202] Mr. Raskin: I will withdraw the last question. I don't want to get into unnecessary discussion on that.

Olson, that the ceiling need not be included in the printed contract? A. That was not agreed to. We would never permit the item of ceilings being placed into our contract because the company had never agreed to any restrictions on earnings as far as our employees are concerned.

Q. You had never done that at any time? A. We have never agreed that there should be any restrictions on earnings of our employees.

Q. Well, I'll ask you this question. You had never inserted in any document ceilings, the use of the word ceilings? A. There was reference made to ceilings in our 1956 strike settlement agreement; but there was never any mention made of ceilings in any of our union contracts from the time that I—

[203] Q. But you did permit it to go into the strike settlement contract? A. That's right, under pressure of a strike, and we were at that time well along in a strike that lasted three and a half months, and we were under terrific pressure and as far as we were concerned, we would have liked to have had complete elimination of ceilings or we'd like to have had a fifteen cent increase in ceilings, but we were only able to obtain a ten cent increase in ceilings, and that document that we signed in 1956 was a strike settlement agreement in which the union agreed to increase the ceilings ten cents; but there is no mention in there that we would not permit employees to earn more than ceilings.

[206] Q. (By Mr. Raskin) Before there was an agreement on the part of the union to increase the ceilings ten cents were there negotiations on the subject of ceiling generally? A. Yes, there were discussions.

Q. And did the company make some offer to induce the increase in the ceiling? A. There were various offers that were

made during the term of or during the duration of the negotiations, yes.

Q. And one of the offers was the company would increase the one cent across the board for a ten cent increase in the ceiling? A. I don't get your question, Mr. Raskin. Would you repeat that?

Trial Examiner: Are you talking of the company or the union increasing one cent across the board?

Mr. Raskin: I should rephrase my question.

Q. Didn't the company offer to increase the rate across the board penny for penny with the increase in ceiling? A. I believe that was one of the positions that was taken during the negotiations up to a maximum of ten cents.

Q. That's right. And this is what you ultimately agreed

upon? [207] A. No, that is not.

Q. Well, the ceiling was raised ten cents? A. The ceiling was raised ten cents.

Q. And what were the wages raised across the board? A. Are you talking about incentive or the—all workers?

Q. Incentive rate. A. The rates of the incentive workers were increased ten cents.

Q. So it was penny for penny, wasn't it, it works out that way? A. It worked out that way, yes.

Trial Examiner: I didn't follow this last. If the incentive worker works on a piece work basis, what is the raise in the ten cent rate signify? Is that an hourly rate, ten cents per hour? Ten cent ceiling rate or machine rate?

The Witness: That was a general increase of ten cents all the incentive workers.

Trial Examiner: \For all the incentive workers?

The Witness: That's right.

Trial Examiner: Were the regular hourly employees affected by this general increase of ten cents?

The Witness: They were affected in a different manner.

Trial Examiner: I see. But that-

The Witness: They also received an increase.

[208] Q. (By Mr. Raskin) Mr. Olson, you are aware, of course, of not only of the presence of ceilings but also

of the enforcement that the union from time to time exerted, is that true? A. I was aware that ceilings existed and I heard occasionally that the union did fine employees for violating ceilings, yes.

[211] Q. (By Mr. Raskin) Did the company in fact pay stewards for time spent in investigating ceiling violations? A. Yes, they did.

[228] CLARENCE H. BOHMANN

was called as a witness by and on behalf of the General Counsel and, having been first duly sworn, was examined and testified as follows:

Trial Examiner: Very well. Mr. Clarence Bohmann having been sworn will take the stand, give his name and address to the reporter.

The Witness: Clarence H. Bohmann, 12320 West Saint Martin's Road, Hales Corners, Wisconsin.

Direct Examination.

[229] Q. (By Mr. Blackburn) Mr. Bohmann, what is your occupation? A. General superintendent of the plant.

[230] Q. In 1956, as I understand, there was a raise of ten cents an hour; is that correct? A. Correct.

Q. And by factoring if I understand you correctly, factoring is the computations that were made to increase the piece rates so that the workers would then get ten cents more an hour; is that correct? A. Correct.

[235] Mr. Blackburn: May I ask a question at this point, Mr. Somers, which may help.

Q. The negotiations in trying to decide how much of a raise these piece workers would get was conducted in terms of a raise of so much per hour; isn't that correct?

A. Correct.

Q. And the final agreement was that the company would raise their wages twenty and a half cents an hour?

A. Twenty and a half cents an hour.

Q. But in order to continue to have a piece rate system, it was necessary to put this twenty and a half cents

an hour into the piece rates? A. Correct.

Q. By which these persons, these employees' wages are figured? A. Right. Now, I can explain how we go about doing that if that's what you originally wanted.

Q. That's what we want, sir. A. You take the \$1.84

which was agreed upon as the ceiling.

Trial Examiner: What do you mean by agreed upon as the ceiling?

The Witness: Well, the old ceiling was \$1.84. Through negotiation it was agreed that we would factor the twenty and a half cents per hour into a rate ten cents below the ceiling so ten cents from \$1.94 is \$1.84.

Q. (By Mr. Blackburn) So I am sure I understand this, Mr. [236] Bohmann, what you are saying is that in negotiating as to this factoring with the union at that time you agreed with them that you would start at ten cents below their new ceiling; is that correct? A. Correct.

Q. Fine. A. You take the \$1.84 per hour and you divide that or multiply that into the twenty and a half cents per hour and you come up with a .11141 per cent of the increase. Now, that per cent is what we take and multiply the old individual piece work rate by to give this employee on a rate of .0711. I am using this example. We took a rate, a legitimate established rate on a particular job which was .0711 and we multiply that by the .1114 percent of increase and we come up with the raise in the rate of .007921251 if you want to carry it out all the way; but we drop those. We make an agreement with the union that we carry out four digits only and stop there, and that brought the rate of .0711 to a new rate of .7902. That was the new rate after the twenty and a half cents was factored into it.

[243] Cross-Examination.

- Q. (By Mr. Raskin) As a matter of fact as this exhibit shows, this general method or manner of factoring in increases was carried on through the years following 1953? [244] A. Correct.
- Q. And it was repeated in 1955 and other years as well; is that correct? A. Right.

[246] Q. Do you know for comparison reasons the general average rate of an incentive worker in Milwaukee in your shop as compared with in the area generally in Milwaukee performing similar type of work?

Mr. Blackburn: Objection. Irrelevant and immaterial.

Trial Examiner: Yes. I had previously ruled out a question put to Mr. Olson; but in view of the nature of this issue, I am going to at this time let the witness testify. We may get into a collateral issue and if it does become collateral so that the proceeding runs out of kilter, I'll exercise my discretion to cut that line of inquiry short; but the matter does touch upon some of the basic factors in the legal issue in this case which may make this relevant. I'll accept it then subject to a motion to strike if it turns out to be immaterial.

Mr. Blackburn: Mr. Trial Examiner, I'd like in order to protect the record to record here an additional ground for this objection.

. Trial Examiner: Yes, you may.

Mr. Blackburn: So it can be ruled on. I would also object in the light of what you have just said that no proper foundation has been laid. I would suggest perhaps Mr. Bohmann should [247] be asked some questions about his knowledge in this field before this final question is put to him.

Trial Examiner: Well, I had rather assumed that there is some knowledge; but I will accept your suggestion and require that the witness be qualified. It assumes a certain amount of knowledge on the part of the witness. You may ask him whether he has that knowledge.

Trial Examiner: Well, the better question would be have you ever made a comparison between your rates—

The Witness: Yes.

Trial Examiner: . He says he has.

Q. (By Mr. Raskin) And for instance when you went into negotiations with the union, you had material that you had gathered or someone had gathered for you so that it may better guide you in your negotiations with the

union; isn't that true? A. Right.

[248] Q. Now, then, from all of that material you gained a certain amount of knowledge as to what the going rate or the average rate of an operator performing the same kind of operations as in your plant is so that you are in a position to compare these rates, right? A. (Witness nodding in the affirmative.)

Q. Now, what is the comparison? Is the average operator in the Milwaukee area performing the same kind of work as yours earning as much as the operator in your

plant or less or more; which is it?

Mr. Blackburn: Objection. Form. The question doesn't specify as of what time.

Trial Examiner: Well, the current rate.

Mr. Raskin: Current, yes.

The Witness:

A. I would say the answer to that question is that our employees are earning as much and more than employees performing the same line of work in other plants in the Milwaukee area.

[249] Q. (By Mr. Raskin) Would you say that the differential between the hourly earnings of an employee in the—in Wisconsin Motor as against the hourly earnings of an employee performing relatively similar work in the Milwaukee area has continued in the same proportion up to the present time from 1955? A. I would say that we have always by our investigation found that we were equal to the other plants or in some cases better.

- Q. As a matter of fact, Mr. Bohmann, in 1955 you had material that you presented to the negotiators; that is, the union negotiators, wherein it showed that the manufacturing industries had \$1.93 average; in durable goods it was \$2.06. In the Milwaukee area the overall average in the Milwaukee area was \$2.18; in the Wisconsin area \$2.00, and you were paying \$2.20 per hour. [250] A. Could be.
- Q. That's right. And you have in a sense retained and maintained that leadership, haven't you? A. We are proud of the fact, that's right.
- Q. And when we are talking about the \$2.20 as an example, we are talking about the average earned rate?

 A. Correct.
- Q. Which, of course, encompasses the ceiling as well, doesn't it? A. Yes, average earned rate is approximately near the ceiling.
- [252] Q. Well, now Mr. Bohmann, you were aware, were you not, that there were ceiling fines imposed for ceiling violations, were you not? A.
- [253] Q. Did any employee ever complain to you that he was being fined for going over ceiling? A. Several employees that spoke to me and said they were being fined.
- [254] Q. How-when was the earliest one? A. Oh, it would be hard to recollect.
- Q. Well, how far back did it go? A. Well, to my recollection from the day the ceilings were imposed or first put in by the union there was very little activity as to controlling the ceiling. That didn't take effect until the later years. I would say 1952, '53 that it became apparent that this was going on and as the years went on, more and more up until now when it really got out in the open.
- Q. Well, as far as the company was concerned, then it was well aware of it since 1952? A. About that time, yes.
- Q. And it was also well aware of the fact that the people were being fined for violating the ceilings? A. Only to the

extent of what the employees told us that they were being find.

Q. You became aware of that? A. That's right.

Q. Did you, did that in any wise disturb you? A. Well, yes, it did.

Q. What did you do about it? A. I myself was one advised them that I wouldn't pay the fine. I says I didn't think it was right.

Q. What did you do as far as management was concerned?

A. Continually objected to the ceiling when we had a chance to [255] and we talked about it that it was unfair to put it on and that the employees could earn more money. They were quitting work at two o'clock, one thirty:

Q. But you continued to factor in any increases based upon ceilings as well, didn't you? A. Oh, sure.

Q. Now, Mr. Bohmann, you of course know how a machine rate is obtained, how you reach a machine rate? A. Yes.

Q. How is a machine rate got? A. The original machine rates, the first machine rates that were had was based on what the employee way back, this goes way back into the '30s, of what the employee was earning at that time, group of employees running a certain group of machines were let's say earning seventy cents an hour. That then became the machine rate of that particular group. Up until that time, we had a day rate which we used. Today a machine rate is based on when we buy a machine, we compare it with a machine that's already in the plant already established in a labor grade and we give the union a proposal as to that is where we think the machine ought to be and that should be the machine rate.

[257] The Witness: Well, by actual years of experience of knowing what the certain jobs ought to pay and by the present machines in the plant we certainly wouldn't have—let's say for instance we have an engine lathe in labor

grade two and we bought another engine lathe but of a different make or model. We certainly propose to the union that the new one be placed in labor grade two with the rest of the engine lathes. We certainly wouldn't say it should be placed in labor grade three or labor grade four. It's based on knowledge of comparison.

[264] Q. Okay. Now let's approach it in another form. When a job is timed currently, at the present, on a particular machine in a particular grade that the machine is placed, is any consideration given to fatigue time, personal

needs, et cetera? A. Oh, yes, when a job is timed.

Q. Yes. And the net result of that is that the engineer who is timing the job together with the representative of the union may agree on what the ultimate piece work charge or cost should be for that particular piece that's produced? A. What do you want to know?

Q. Well, is that the way it's done? A. You take and time a job. You time the operator how long it takes him

to make this particular piece-

- Q. Yes. A. —including picking it up from the floor, loading it into the machine, bench work or what. When you arrive at this average time that it's taking him, that is then taking the machine rate. You find out how many pieces he must make an hour to produce this particular machine rate. When you have arrived at that, you then add the allowances for personal time, fatigue time, tool time, whatever his needs may be. That's added to it and that is the incentive for the employee to make over and [265] above the machine rate. The machine rate is the minimum what he should make.
- Q. Well, when you say minimum, you mean that working at a normal pace? A. Correct.
- Q. Any competent operator should earn this particular rate? A. He should earn not less than the machine rate.
 - Q. Not less? A. That's right.
- 'Q. And if a person earns less than that or makes out less than that, then you may have reason to discipline him,

is that it? A. Yes. We would at least call him in and find out why he isn't making the machine rate.

- Q. So that the allowances whichever way you look at it become a factor in this pricing; is that correct? A. Correct.
- Q. Now, the allowances are for what? A. The allowances are let's say during the course of the day the operator has to spend a half an hour for grinding tools. Well, it's figured out on a percentage basis how much he needs for tool allowances. He has a certain allowance for personal and fatigue allowance. We give operators an allowance for what we call so-called make up allowance where little incidentals crop up that you don't figure on and those are all part of his [266] incentive to get by or to use as least of those allowances as possible and turn that into money for making beyond the machine rate.
- Q. And does that vary in percentage, does that vary from job to job? A. Oh, yes, yes.
- [273] Q. Now, when a person or an operator, rather, in working at his [274] machine makes out or produces or earns an amount which is more than ceiling or rather strike that, which is more than machine rate or earned average rate on a new job and the ceiling that was, that has been established by the union, he therefore utilizes a portion of these allowances, allowance time that was given him through the process of timing; is that right? A. Correct.
- Q. So that while the company and the union have agreed that he should have certain allowances for fatigue, persenal needs, make up, tools, et cetera, the operator if he uses such time for production itself would be producing more than machine rate or average earned rate depending on the timing job? A. Right.
- [280] Q. Well, I want to make that clear, here. If the company wants to, if it has need for it, the company actually use the pieces that have been produced even though those pieces are beyond the ceiling rate? A. They are

put in the skids and gondolas right along with [281] the rest of them. 'At the time it happens we don't know they are in there. We can't control it that close to know that he did make some in the bank.

- Q. So they are in the flow of production? A. Normally, naturally they would be.
- Q. So what is actually held back is the reporting in or the charging the company for all of the pieces? A. Correct.
- [282] Q. Well, do you have a rule which states that a person, an employee shall report all his pieces that he produces in any particular day or on any particular job? A. Not on a particular day. We have a rule that when inventory comes around we will not pay for any material that employees have held back. They have got to have an accurate accounting of their pieces. They have got to be hurned in up to date.
- Q. As of the time of inventory; is that right? A. That's correct.
 - Q. But not from day to day?, A. Not from day to day.
- [284] Q. Well, Mr. Bohmann, I asked you to name a single person, a single employee so that we could actually verify it and not travel through the clouds, who was disciplined for not reporting whatever he had produced. Name them. [285] A. I told you there were two employees I know of that were disciplined. I don't remember their name. It was many years ago.
 - Q. How long ago? A. A good fifteen years.
 - Q. Well, that would make it about 1947? A. About that.
 - Q. '46; is that right? A. About that.
 - Q. And none since that time? A. Not that I know of.
- Q. And you couldn't even name the two back in 1946 or '47? A. No. I don't remember his name. All I can say is one was an Irishman. That's all I can remember. I can't recall his name.

Q. Shall we start with O'Brien? A. No.

Mr. Raskin: All right.

Trial Examiner: When you say holding back pieces, you didn't mean that he didn't turn the pieces in for actual use by the company. What you meant was that he didn't report the pieces above a ceiling, is that what you were saying?

The Witness: That's correct. He had them in a bank and he didn't report them in and we had come along and taken inventory and after inventory he started handing these pieces in and the company discharged—

Trial Examiner: When you say handing these pieces in, he started turning them in?

The Witness: Turning them in on a work card.

Trial Examiner: Reporting them?

The Witness: Reporting them, that's right, and in these two occasions the company disciplined by discharging both these employees.

Trial Examiner: Well, did you know there was such a thing as a ceiling set by the union in '46 and '47?

The Witness: Yes, we knew that.

Trial Examiner: All right. Go ahead, Mr. Raskin.

- Q. (By Mr. Raskin) Nevertheless, you do know and you do recognize the fact that since 1946 or '47 the bank method of reporting has been continuously used by the employees in the shop? A. Correct.
 - [295] Q. Now, your shop works under what might be considered an integration between one department and another through the assembly and the final finish of the job itself or the product itself; is that right? A. Right.
 - Q. So the question of timing or the flow of goods is pretty—must be pretty well exact, is that it? A. Oh, yes.
 - Q. In order to come out right? A. Fairly good.
 - Q. Now, when you begin a day's operation or a week's operation or a job operation, you pretty well know just how the goods are going to flow and just how in what numbers they are going to be produced, do you not? A. Right.

Q. And you know that because the ceiling has a somewhat of a control on the production of the pieces, isn't that true?

Mr. Blackburn: Objection. Form. Conclusionary.

Trial Examiner: Overruled.

[296] The Witness:

- A. It's not the ceiling, its' the average earned rate of the employee and the average amount of pieces he makes every day that controls that production.
- Q. (By Mr. Raskin) And the average earned rate or the average amount of pieces that he makes today is pretty well established by what he had made yesterday through the process of the ceiling, isn't that true? A. Not always.
- Q. Well, what then is the average earned rate? A. The average earned rate is the average amount of earnings that the employee makes from day to day.
- Q. So that even beforehand by virtue of the ceiling being part of the price arrangement, you generally know what would be the maximum or near maximum that the employees would produce from one department to another? A. Sure we would.
- Q. All right. And by such process it assists you in the integration of the operations and in the final production of the product, isn't that true?

Mr. Blackburn: Objection. Form. Conclusionary.

Trial Examiner: Overruled.

The Witness:

A. Right.

- Q. (By Mr. Raskin) Now, when an employee has tool trouble [297] beyond the allowance that was already given consideration in fixing the machine rate, that is considered down time? A. Down time, correct.
- Q. And under the contract is the company called upon to pay him something for the down time? A. Right.
- Q. And what he's paid is the day rate or— A. It's usually we start out if it's depending on just what the circumstances are. It may be machine rate, it may be a rate between machine rate and his average earnings.

- Q. What is it that you do have to pay him under the contract for down time? A. Machine rate.
- Q. All right. But actually he's not producing, is he? A. Right.
- Q. Therefore, if you were required to pay him as you are under the contract, you would be paying him for non-production operation if we can call it that; is that right?

 A. Right.
- Q. However, if the employee would dip into his bank and report that in lieu of the down time, the company then would be saving that amount of money, would it not? A. So to speak.
- Q. Yes. And you know that to be a practice that has been going on in the plant; is that right? [298] A. Right.
- Q. (By Mr. Raskin) Well, would you say that the production of scrap is below normal in your plant? A Compared to other plants, I would say our scrap is below.
- Q. Can you tell us to what factor or factors you could attribute that? A. Good machines, good castings, good workers.
- Q. Would you also attribute it to proper allowances?

 A. Sure.
- Q. So that in determining the normal pace and timing a many taking that into consideration, you give him such allowances that would permit him to produce non-scrap material, is that it? A. Yeah, you could say that.
- Q. And in the corollary or the reverse of that would be that if an operator continuously speeded up, continuously used up all his allowances in production proper, it might in effect result in a greater amount of scrap? A. Not unless he got careless.
- [299] Trial Examiner: Well, Mr. Bohmann, the question is simply this: You have stated that these allowances are a factor which account for, are a factor among other factors which account for your having a below record, a

below normal record of scrap. The inquiry is this; that whether an employee's eating into those allowances and engaging in production during times for which allowances have been made say fatigue time, adjustment [300] time, whether under those circumstances the risk of scrap isn't increased as a pure production matter.

The Witness: The risk is increased, sure.

Trial Examiner: You say the risk is increased under those circumstances. In other words, the more the employee eats into the normal allowances you have taken into consideration as setting the rate, the greater the increase of scrap as a production matter.

The Witness: It just so happens we don't have that experience that we get more scrap. I say it increases the risk; but we are not—

Trial Examiner: That's the only question being asked, whether it would increase the risk.

The Witness: We are not faced with it,

[312]

HAROLD A. TODD

was called as a witness by and on behalf of the General Counsel and, having been first duly sworn, was examined and testified as follows:

Direct Examination.

- Q. (By Mr. Blackburn) What is your full name and address, sir? [313] A. Harold A. Todd, 1919 Forest Street, Wauwatosa.
- Q. And what is your occupation, Mr. Todd? A. President and general manager of Wisconsin Motor Corporation.
- [320] Q. What has caused the decline in the number of Wisconsin Motor shop employees since 1951? A. Reduction in sales.
- Q. And what has caused the reduction in sales? A. Primarily competition, especially in our engines up to and

including about nine horsepower where we are-where we have the greatest amount of competition in there especially with Briggs and Stratton, Clinton, Lawson, Kohler, our prices of our engines are inherently higher than the comparable sized engines of the companies that I just mentioned because we put certain items in those engineswhich are expensive and makes for a quality engine that the other companies do not put into [321] their engines. These items are recognized as increasing the quality of the engine by the purchasers of the-of those sizes of engines. In those sizes, in those customers, let's put it that way, our purchasers of those sizes of engines, there is two classes of people. There is one class in there that buys strictly and only on price. There is another classification or class of purchasers of those size of engines who buy on quality. The people that buy on quality will and do pay the increased price that we have to get for our engines over that competition. The other class of purchasers buys strictly on price and I can remember one day there when I argued with a purchaser of engines. I argued with him for pretty nearly on all day with a difference of price of ten cents between our engine and a competitive engine. We had several cases not too long ago where we lost some very sizeable orders because of our price was too high over the competition. It's our feeling that if there were no ceilings we would get increased production which, of course, we would have to pay for the pieces that would be produced but we would have more labor to spread our overhead over especially our fixed burden which would serve to reduce our costs and thereby enable us to be more competitive.

[325] Cross-Examination.

Q. (By Mr. Raskin) Mr. Todd, you say that your company produces a pretty good quality engine? A. I not only say it, I'll swear to that.

Q. And is that made possible in part by the operators and the employees who are members of this union? [326]
A. In part undoubtedly.

- Q. You do give them credit for that, don't you? A. Oh, yes. I'll give the devil his due any time.
- [332] Q. (By Mr. Raskin) Mr. Todd, has the company paid dividends consistently over the last twenty five odd years? A. Over the last what?
 - Q. Twenty five odd years? A. No.
- Q. Over how many years? A. Not exactly sure; but consistently, I think only since my recollection goes back to about 1946. I am saying consistently, now.
- Q. That means, of course, that you never missed a dividend since 1946? A. Right. It could be later than that. I think it is. I am not sure.
- Q. You are pretty proud of that record, too, aren't you, Mr. Todd? A. Oh, yes.
- Q. And during all that time there was a ceiling in the plant, wasn't there? A. Yes. I presume so. Yeah, since '46, yes.

[362] CLARENCE H. BOHMANN

resumed the stand, and, having been previously sworn, was further examined and testified as follows:

[369]

Re-Direct Examination.

[372] Q. (By Mr. Blackburn) Mr. Bohmann, on a given day a piece worker through no fault of his own cannot produce any pieces at all and he doesn't have anything in his bank to show as production for that day. At what rate is he paid?

Trial Examiner: He's paid the machine rate. We have gone over that.

The Witness: That's right.

Q. (By Mr. Blackburn) He's paid the machine rate? A. If he can't produce any pieces through no fault of his own, he's paid machine rate.

- Q. What is the day rate in the contract? A. The day rate is a rate which he gets for let's say for instance he makes scrap. He's paid day rate. We don't pay him his piece work earnings, we don't pay him machine rate, we pay [373] him that day rate. Employees used to be paid day rate for the taking of inventory. Different items. That's what the day rate is for.
- Q. And does it follow that day rate is the minimum amount of pay that the employee can get from the company under the contract? A. Day rate is the minimum amount of pay he can get in any instance.
- Q. Under whatever circumstances? A. Under whatever circumstances.
- Q. Has the company ever fired anybody who was making the machine rate because he failed to make the ceilings? A. Not to my knowledge.
- [374] Q. And at the time of inventory do the employees' banks have to be emptied out? A. That's correct.
- Q. So at the beginning of the new year after inventory everybody starts fresh; is that correct? A. Everybody starts fresh.
- [381] Q. (By Mr. Raskin) All right. It's an accepted fact, is it not, Mr. Bohmann, that as far as the company knowledge and information is concerned that the employees generally abide by the ceiling provision? A. Yes.

[401]

RUSSELL YOUNG

was called as a witness by and on behalf of the General Counsel and, having been first duly sworn, was examined and testified as follows:

Direct Examination.

Q. (By Mr. Blackburn) Where do you work, Mr. Young? A. Wisconsin Motor Corporation.

[402] Q. What job do you hold? A. General foreman.

[403] Q. What time does the day shift go to work, Mr. Young? A. The day shift starts at seven o'clock.

- Q. And from your observations over the years, what time do the employees actually begin working? A. Well, if we were to take an average between seven and seven ten, I'd say a fair figure or a clock reading would be about seven five.
- [405] Q. (By Mr. Blackburn) And what time does the day shift end [406] according to the contract? A. The day shift ends at three o'clock.
- Q. And on the average from your observations over the years, when do the employees actually stop working?

Mr. Raskin: That's objected to as-

Trial Examiner: Well, let him testify. Well, overruled.

The Witness:

A. O At one forty five.

Trial Examiner: When do they go home, Mr. Young? You say they stop working at one forty five. When do they leave the plant?

The Witness: They are allowed to punch out on a normal day at five minutes to three.

Trial Examiner: I see. All right.

Q. (By Mr. Blackburn) And what do they do between one forty five and five minutes of three on the average day?

Mr. Raskin: Objected to as immaterial.

Trial Examiner: Same ruling.

The Witness:

A. What do they do again-

[407] Q. (By Mr. Blackburn) Yes. A. —between one forty five and three o'clock?

Q. Or five minutes of three when they are permitted to punch out. A. Multiple things. There was a time when they'd sit out and the plant looked similar to a library.

Some of the boys will go to the locker room and put on their street clothes minus their outside garments weatherwise. There was a time they played cards all of which has been stopped. I would say they engage in conversation and twiddle their thumbs at the present time.

- [415] Q. (By Mr. Blackburn) Mr. Young, are you familiar with the [416] five per cent personal time and five per cent fatigue time as it figures in the work at Wisconsin Motor? A. If you are referring five per cent personal and five per cent fatigue in light of establishing rates, yes, I am familiar.
- Q. I think that's what I mean, Mr. Young. If you translate that five per cent plus five per cent into ten per cent and then apply it to an eight hour day, how many minutes do you get? A. It would be forty eight minutes.
- Q. And what are those forty eight minutes meant to be used for by the employees? A. Those forty eight minutes that are averaged into the piece work rate are solely there for one purpose; for the man himself. For example, if an engine is clocked and time studied at machine rate and the rate comes out to \$4.00, we will add five per cent personal and five per cent fatigue and a card will be written out for \$4.40. That is for the employee to go to the men's room, go to the soda dispenser, get a package of cigarettes, candy bar, perhaps go to the tool crib for his personal face towel and it is used up the minute the shift starts.

Trial Examiner: What do you mean it's used up the minute the shift starts?

The Witness: By that I mean the forty eight minutes is attached as the shift starts. For example, if said number of people go to the lavatory. He is in the process of using up the [417] forty eight minutes.

Trial Examiner: But—I will try to understand. You said it's used up the minute the shift starts. I thought it could only be used up after the shift starts.

The Witness: I think I worded that wrong. It is used up as the day progresses would be better.

Trial Examiner: I see. All right.

- Q. (By Mr. Blackburn) The ten minute morning lunch period, is that figured as part of the forty eight minutes a day? A. No, sir.
- Q. And how about the fifteen minute noon lunch period? A. No, sir.
- Q. In other words, the forty eight minutes a day is for the use of the employee in addition to those two breaks during the day? A. Yes, sir.
- Q. Mr. Young, can those forty eight minutes be considered in the time that the employees are not working in and around the morning lunch period, in and around the noon lunch period and during the period at the end of the day at which they are not working?

The Witness: Repeat that once more, please.

Trial Examiner: Want to read that question to Mr. Young, please.

(Last question read.)

[418] Mr. Blackburn: You understand my question? Perhaps I can rephrase it, Mr. Young.

The Witness: I think I understand it.

Trial Examiner: Will you answer it, then.

The Witness:

- A. It is segregated from those down times. That forty eight minutes is used up while actual production is taking place. The rate card says so. If I build an engine that calls for a \$4.00 piece work rate and to that has been added a ten per cent allowance for my person, then any time I step back, talk to a buddy of mine, light a cigarette, go to the lavatory, contact my steward on some personal business whether things are being handled right or I have an objection, it is continually being used up in light of building the engine.
- Q. (By Mr. Blackburn) So that employees when they are on the morning lunch period, the noon lunch period, and the time at the end of the day at which they are not working are not utilizing the forty eight minutes provided for them in the five per cent personal time and five per cent fatigue time which goes into the machine

rate or piece rate computations; is that correct? A. That is correct.

[420]

Cross-Examination.

[425] Q. Have you—strike that. Have you ever filed a grievance with—strike that. 'Following your discussions with management about all these troubles and problems that you have, has there ever been any decision made that you had to carry out with respect to stop working at earlier than the shift is over? A. You are specifying what is on these sheets now?

Q. Yes. A. Or early shift?

Q. Well, any one of the shifts. A. All right. The question again is what?

Mr. Raskin: Read that question.

(Question read.)

The Witness: My answer to that question is yes. Let's go into the reading situation where we sit down, our good people and read books after they are through working. That was taken to top management and something was done about it.

Q. (By Mr. Raskin) I see. And the reading was cut out, is that it? A. I'd say ninety nine per cent. Here and there they are getting by with it yet.

Q. That takes care of the reading. What other decisions did you carry out following your bringing to the attention of management all of these problems that you have? Maybe I can help you. The card playing was cut out, right? A. That popped up just the other day. They were playing cards [426] down there at twenty minutes to one.

Q. But you stopped it, didn't you? A. I hope it stays stopped and the stewards cooperate very nicely.

Q. All right. We got the reading taken care of, we got the card playing taken care of. What else is there that you carried through?

The Witness: In explanation in light of the card playing and the reading, the primary purpose to remove that since it is a manufacturing plant was to make it undesirable and there is [427] nothing worse in my humble opinion on a human being than to sit idle for three hours a day.

Mr. Raskin: Well-

Trial Examiner: Well, that really is the important part of Mr. Raskin's question to mean not the method as to how to spend their time after production stops but the issue of whether production should stop. Has management done anything about that, about the question as to whether production should stop at a given time earlier than the regular time as you have recorded it?

The Witness: Well, yes, that would be out of my scope, Mr. Raskin. I think I understand you better now. I think during the past few days it has been brought out that Mr. Olson, Mr. Bohmann, people concerned in negotiating the contract had endeavored to get the union to raise their AER.

- Q. (By Mr. Raskin) All right, Mr. Young. I take it that as far as you are concerned as general foreman there have been no directions or orders given you with respect to the early shutting down of some of these machines; is that right? A. That's right.
- Q. Nobody was disciplined for it; is that right? A. For shutting down early?
 - Q. Yes. A. We have used-
- Q. Well, now, answer that yes or no. [428] A. Yes, yes.
 - Q. Now name them. A. We have used discipline.
 - Q. Name them. A. We have used-
- Mr. Zahn: Mr. Examiner, I submit the witness be allowed to answer the questions.

Trial Examiner: What do you understand by discipline? Now you answered no. Now what do you understand discipline to be? What kind of discipline did you have in mind?

The Witness: I have disciplined in light of faulty workmanship. For example, a line getting through early—

Trial Examiner: Yes.

The Witness: —and we have contacted and worked out with the union through their stewards with the people on the line in light of rectifying their errors, company naturally pays the bill which is day rate. That is a discipline because somewhere down the line their earnings do get hurt. Away from the actual shut down say it would be one thirty, one o'clock, two o'clock, no discipline has ever been given because a man sat down. Discipline has been given for reading, for card playing and so forth. Discipline has been given for leaving the department and sunning themselves in the back yard, yes, sir; but not for the actual shutting down of the line.

[429] Q. (By Mr. Raskin) Now, the employee doesn't get paid for his lunch period be it in the morning or in the—later on, is that true? A. The incentive employees do not.

[435] Q. Did you ever make a study as to the most productive hours of an employee, Mr. Young? A. Yes, sir.

Q. Would you say that his most productive hours are the first hours, the first few hours that he comes into the plant? A. Yes.

[461]

GEORGE KOZBIEL

was called as a witness by and on behalf of the General Counsel and, having been first duly sworn, was examined and testified as follows:

Direct Examination.

- Q. (By Mr. Doppelt) And where are you employed, Mr. Kozbiel? A. Wisconsin Motor Corporation.
- Q. And how long have you been so employed? A. Sixteen years.
- Q. And what is your position there? A. I am a bench hand.

- Q. And have you been a bench hand for sixteen years? A. No. I was a rotomatic operator. I was a milling machine operator, drill press operator, babbiter.
- Q. All right, fine. And are you also a member of Local 283 UAW? A. Yes.
- Q. And how long have you been a member of that union? [462] A. Sixteen years, since I been there.
- Q. And have you ever held a position with the union? A. Yes.
 - Q. What position did you hold? A. I was a steward.
 - Q. And when were you a steward? A. 1959.
 - Q. In 1959? A. To 1960. Yes, 1959, 1960.
- Q. Now, while you have been with Wisconsin Motors, have you exceeded these production ceilings? A. Yes.
 - Q. And have you exceeded them regularly? A. Yes.
- Q. And did you exceed production ceilings in February of 1961? A. Yes.
- Q. And in April of 1961 were you fined by the union for exceeding production ceilings? A. Yes.

[466]

Cross Examination

- Q. (By Mr. Raskin) Mr. Kozbiel, how long have you been a [467] member of the Local union, the Respondent in this case? A. Since I started. I believe 1945.
- Q. And your membership in that union has been continuous? A. Yes.
- Q. Have you from time to time attended any Local union meetings? A. Yes.
- Q. Have you participated in Local union affairs in any way? A. Yes.
 - Q. As an officer? A. Yes.
 - Q. In what office did you hold? A. Steward.
- Q. And when did you first become a steward? A. I believe it was 1959.
- Q. And how long did you hold your stewardship? A. Till February of 1961 when I was suspended.

[468] Mr. Doppelt: Mr. Examiner, I think the General Counsel will stipulate the trial was held in accordance with the UAW constitution and rules of the UAW constitution.

Trial Examiner: All right.

[508]

DALE L. STEINFELDT

was called as a witness by and on behalf of the Respondent and, having been first duly sworn, was examined and testified as follows:

[509] Q. Have you at any time held office in the union? A. I have.

- [511] Q. Now, I have already shown both counsel what I am now going to submit to the witness. Will you tell us what your records show with respect to prior convictions and fines of Mr. Emil Stefanec with respect to ceiling violations? A. These records indicate that Emil Stefanec prior to the time that he was charged with the present violations was called to the ceiling violations committee hearings for violations occurring first time on May 29, 1957, at which time a \$1.00 fine was assessed and the second time on July 24, 1958, at which time a \$1.00 fine was assessed and then suspended.
- Q. Now, give us the same responses as to when previous convictions and fines were assessed against Scofield. A. According to the information here, Russell Scofield was [512] guilty of a first violation on August 20, 1946, and on the second violation on February 16, 1954, at which time he was warned. The third violation of which there were three, the dates 5-29-57 and September 16 of 57, total of three violations, fined \$3.00. Again he was called in for violations for the period of December 1, 1959 to December 18, 1959, consisting of sixteen individual violations. At that time he was fined \$1.00 for each offense or a total of \$16.00. On March 24, 1960, the committee says he was called in on

five violations and fined \$1.00 for each violation or a total of \$5.00.

- [515] Q. And have you from time to time observed the action and conduct of the various employees both within your department and outside of it with respect to quitting work at any particular time before the shift— A. I have.
- Q. And what have you seen and observed? A. Well, to answer that question properly I think I'd have to dispute the—
- Q. Well, just never mind what you have to—you just go right to it and speak. A. Well, Mr. Young testified yesterday that the assembly floor concluded their full day's production in somewhere around five hours. Now, this I dispute as incorrect on this basis; that on the assembly lines when the engines cease to go off the end of line which would represent the group's production ceiling for that particular day, the various line assemblers then take up other duties which consist of preparing for the next day's production involving assembling of sub-assemblies which would be assembled to the engine the next day, preparing their other material such as sheaves on bearing plates and cap screws and lining up the material in general for the next day's production.
- Q. Now, are they paid for that time? A. They are paid for that time out of that day's production of the group. [516] Q. In other words, they are not paid any additional sums by the company as so-called down time or anything of that kind? A. No.
- Q. How many employees—let's assume now that we refer to your group of some 120. How many employees would that involve? A. Well, first of all 120 is the man power complement of all the assemblers in department five which is broken down into five separate groups. On my particular line to which I am assigned, I think at the present time we have in the vicinity of twenty five men. Of these twenty five men, I would say that somewhere between fifteen and twenty would be involved in the side assemblies and other duties after the engines actually stop going off of the line.

- Q. Now, is this a daily process or does it vary from week to week? A. It's an essential daily process because had this not been done, it would be impossible for the group to make ceiling wages the next day.
- Q. So that what the employees do following the shut down of the machines proper is in the nature of preparation and production work? A. That is correct.
- Q. Are you familiar with other parts of the plant with respect to such practices? A. I am.
- [517] Q. And what can you state generally is the conduct of the other employees? A. Well, in the other manufacturing vicinity departments I would say primarily the same principle prevails; that after the machines shut off and the pieces actually stop flowing from that machine on that particular day, the operator then assumes other duties in preparation for the next day's production such as preparing his tools, lining up his material, cleaning the machine, and so on.
- [521] Q. Did you participate in—before that year? A. In 1956 I did.
- Q. Okay. And this also was during the period of the strike? A. That's right.
- Q. And was the subject of ceilings discussed at that time? A. To great lengths.
- Q. Yes. And what were the positions taken by the respective parties?

Mr. Blackburn: Objection. Conclusionary.

Trial Examiner: That's a general question.

Mr. Raskin: I am trying to hurry this thing.

Trial Examiner: The point is was there any discussion with the company which the union stated to the company, what it sought to achieve by the ceilings.

Mr. Raskin: That's right.

Trial Examiner: By the production ceilings.

Mr. Raskin: Will you answer that question. I'll adopt the question as proposed by the Trial Examiner.

Trial Examiner: Do you understand that question?

The Witness: Not entirely, Mr. Examiner.

Trial Examiner: Well, did the union representatives tell the employer's representatives just why they had a production ceiling?

The Witness: Yes.

Trial Examiner: And why they were—why they justified [522] the particular production ceiling there?

The Witness: Yes.

- Q. (By Mr. Raskin) All right. Will you tell us that. A. Well, during the strike the production ceilings were one of the main points of disagreement and the union stead-fastly held to the principle that we thought that our production workers had just about reached their capacity in productive power and that any increase in the ceilings would result in a hardship or physical, mental and otherwise being placed on them and if the production ceilings were removed or increased to any great extent that this would result in the company making efforts to change the methods used on productive jobs and subsequently reduce the rates and this in turn would result in lesser amount of production employees being employed by the company.
- Q. And as a result of these discussions ultimately a new method, a new ceiling was adopted, is that it? A. That is correct.
- [524] Q. (By Mr. Raskin) Mr. Steinfeldt, did you at any time as secretary of the union receive any requests or communication either orally or in writing by any of the four charging people that they desired to withdraw from the union? A. I have not.

[548]

NORMAN A. WOLD

was called as a witness by and on behalf of the Respondent and, having been first duly sworn, was examined and testified as follows: Trial Examiner: Will you please be seated and give your [549] name and address to the reporter.

The Witness: Norman A. Wold, 2034 South 79th, West Allis.

Direct Examination

- Q. (By Mr. Raskin) Is the "A" for Al? A. "A" is for Al, that's right.
- Q. And that's what you are usually called? A. In the shop, yes.
- Q. How old are you? A. I am now sixty eight years old.
- Q. And where had you been employed? A. Wisconsin Motor for the last twenty five years.
 - Q. And are you now retired? A. Correct.
 - Q. How long ago did you retire? A. June 1.
 - O. 1961? A. 1961.
- Q. At the time of your retirement, what kind of work were you doing? A. I was working on a drill press, probably a large drill press in the shop, working on the incentive system.
- [552] Q. Relate that to the subject of the ceilings. A. We figured it was taking up too much of our time and well, we talked it over. We called a group of fellows over. So somebody made the suggestion, I can't think of the-well, why don't we call a meeting, get a meeting, get those fellows together, those fellows that's interested in this thing. So I went over from one department another and I pick up a representative [553] group from each department, each line, and we met in the cafeteria. We talked this thing over for not one meeting, we talked it over five or six meetings. I'd say that maybe more, but at least five or six. Well, what are we going to do, fellows, and we had one fellow there that we were talking about ceilings. That's when the ceiling thing first come up. We talked about well, what are we going to do. We have got to do something. You know, in the shop there around Thanksgiving Day or near Christmas, why there was layoffs and the fellows were getting older. Some of the fellows were getting older and the young fellows would come in

and they would push, push, push, so we wanted to see that this labor state keep as many fellows working as we possibly could, and we know if we put this thing on there it would provide for at least a few more fellows to stay at work. So we thought the thing over. I'd say that it wasn't any board of directors. It was the group. They voted on it at the union and they have had many a chance over the years to kick it out or put it in or whatever. In fact, it has been brought up and I'd say ninety eight per cent of the fellows right today are 100 per cent for this ceiling because it provides jobs. It provides for not too much pressure working piece work fellows. I don't know whether you have ever done that or not; but there is always a pressure, a pressure all the time. You want to make out. You want to make as much as you can up to a certain point and we figured well, here's [554] a leaving off period and we made a survey of this district around here number ten. We went all the way to Detroit. We looked at different contracts. We contacted different people to try to get as fair a rate as we possibly could. So we was over to Chicago on the labor board then and-

Q. This was in 1944? A. 19- it was, I think it was.

Q. You so testified, so go ahead. A. We wanted to set up classifications. That's what we did up there, classifications. That's where you get your five grades. So I think Mr. Wurtz and Mr. Todd and oh, Mr. Olson and myself, maybe another one or two. I think Ray Daniels was there, and we probably went up there maybe three meetings, four meetings, and finally the labor grade was set up and then as we knew, there was a war on, we didn't want to hold back anything, but we also wanted to provide jobs for the fellows and well, I say we had a time study man there at one time.

GENERAL COUNSEL'S EXHIBIT No. 12

AGREEMENT

Between

WISCONSIN MOTOR CORPORATION

and .

INTERNATIONAL UNION UNITED AUTOMOBILE, AIRCRAFT
AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA
(AFL-CIO) LOCAL 283

Dated: May 1, 1959

ARTICLE XI.

WAGES

90. Section 1-

A. Jobs shall be so priced as a result of a time study that the average competent operator working at a reasonable pace shall earn not less than the machine rate of his assigned task.

B. Old jobs will be re-studied or the rate reestablished on a job when the employee working on the job cannot make the machine rate while working at a reasonable pace and using the normal allowances. On re-studies the same time study procedure and allowances will be applied as on new jobs.

95. Section 6-

When a piece work employee fails to make out on a job through no fault of his own and has notified his Foreman, he shall receive an allowance through his Foreman in an amount that will permit him to make not less than his machine rate, or the Foreman can give him an allowance that will bring his earnings somewhere between the machine rate and his average earned rate. This will also apply to:

- 1. Hard castings.
- 2. Excessive stock.
- 3. Service work where there is no established rate.
- 4. Minor repairs of machines, jigs or fixtures with the approval of the Foreman.
- 5. When rebuilding lines on the Assembly Floor.
- 99: Section 10-Under the following conditions machine rate will be paid:
- A. Salvage work. If such service or salvage work is longer than two (2) hours duration, the Company will make every effort to establish a temporary piece work rate.
- B. Excessive tool trouble (this shall not include tool changes provided for in the piecework price.)
- C. Waiting for material or jobs, for all time when such waiting exceeds two (2) periods (of six (6) minutes each) and the Foreman has been notified.
- 100. Section 11-Under the following conditions, day rate will be paid:
- A. Cleaning machines (where there is no established rate).
- B. Lost time (power failure, waiting for tools, where the operator is negligent, or waiting for a job when it is two (2) periods (of six (6) minutes each) or less).
- C. General clean-up and trucking.
- D. When a piecework employee fails to make out on a job through no fault of the Company.

109. PIECE WORK CLASSIFICATIONS:

Machine		Day
Rate		Rate
\$2.455		\$2.24

GRADE 1

GENERAL COUNSEL'S EXHIBIT No. 14

CEILINGS

- A. The basic objective of the Union is, to protect members of the Union in their employment and to give them as much security as the industry can provide. The Local Union in its judgment and reasoning has established a production ceiling which it feels will bring more protection to the members. It follows that a member who is found in violation of this rule is guilty of conduct unbecoming a Union Member.
- B. Any member violating these ceilings, shall be subject to a fine of One Dollar (\$1.00) for each violation. The violators shall be processed by not less than 3 nor more than 5 members of the Executive Board,

In case of persistent ceiling violations, the member will be charged with conduct unbecoming a Union Member.

GENERAL COUNSEL'S EXHIBIT NO. 22

August 14, 1956

STRIKE SETTLEMENT AGREEMENT

This Agreement made this 14th day of August, 1956 by and between the Wisconsin Motors Corporation and the International Union, United Automobile, Aircraft and Agricultural Implement Workers of America and its Local 283.

The parties agree that the 1954-6 contract shall be modified by substituting the language contained herein, where such may modify or be in addition to the language in said contract. WAGES: The day rate classifications will be increased as follows, and each employee working in a labor grade shall have this individual rate increased in the amount that labor grade is increased.

LABOR GRADE	1A, 1B	, and	1							 				.18	
LABOR GRADE	2A and	2 .	. ,							 				.17	•
LABOR GRADE	3A, 3B	and .	3.				 			 				.16	,
LABOR GRADE															
LABOR GRADE	5					 				 			٠.٠	.14	
LABOR GRADE	6A and	6 .												.13	
LABOR GRADE	7							٠.		 			.,.	.13	
LABOR GRADE	8			 . 3						 				.13	
LABOR GRADE	9 :												 	.13	
LABOR GRADE	10'								1	 	10			.05	,

The incentive classifications day rates and Machine rates shall all be increased ten cents (10¢) per hour and each employee's individual rate shall also be increased 10¢ per hour. This amount shall be added on the "Clock Hour" in addition to the three cents (3¢) presently added until this total thirteen cents (13¢) can be factored into the incentive rates. The factoring in the incentive rates shall be made on the same basis as was made on 10-8-53.

The Wage increases provided herein shall be made effective May 1, 1956.

CEILINGS: The ceilings on earnings is to be raised ten cents (10¢) per hour above the general increase of 1-1-56 and the ten cents (10¢) of 5-1-56 or a total of 23¢ per hour.

Signed this fourteenth' day of August 1956

FOR THE COMPANY:

FOR THE UNION:

ment was not challenging the cases embodying controlling doctrine, but was merely claiming that this case was distinguishable from them. The nature of controlling doctrine will be amplified in our conclusionary discussion, but for purposes of clarifying the development of the issue, it will be briefly summarized here. The doctrine controlling under Board lore is embodied in such cases as International Typographical Union (American Newspaper Publishers Association), hereafter foreshortened as the "ITU" or "ANPA" case and Minneapolis Star & Tribune Co. In the ITU case the Board, with the Seventh Circuit affirming it on that point (supra, n, 6), held that not all union action that restrains or coerces offends 8(b)(1)(A), one exception thereto being unions' internal rules and the exertion of internal disciplinary powers to enforce them. The one involved in ITU was a rule requiring members to work only under illegal closed shop conditions, and it was held that the union's threat to expel members who did not comply was immune under the proviso, and not a violation of 8(b)(1)(A). In Minneapolis Star, the Board held that under the interpretation of the proviso as enunciated in the ATU case, a union's assessment of a fine upon members for violating a rule against working during a strike was likewise not a violation of 8(b)(1)(A).

The essence of these cases is that a union is immune under the proviso as long as the sanctions used to compel conformity with a given rule or policy, whatever its content or character, are confined to its internal powers of discipline over members, and that liability under 8(b)(1)(A) begins only where these internal sanctions leave off. That

^{6. 86} NLRB 951, 955-7 (1949); affirmed as to that point; ANPA v. N.L.R.B., 193 F.2d 782, 800, 806 (1951), cert. denied as to that point 344 U.S. 812 (1952).

^{7. 109} NLRB 727 (1954).

is to say, a union loses its immunity under the proviso when the measures used to compel conformity with a given rule of policy reach outside the membership confines, but retains it when it stays within them,

On the premise that controlling doctrine as above enunciated was accepted by government counsel as the point of departure in the consideration of the issue here, I had assumed that the Government's theory of liability was based, as in such case it would have had to be, solely on the single factual variance of this case from Minneapolis Star-namely, that the Union here did not assess the fine as an added condition of membership under penalty of expulsion if not paid, but as a debt asserted as collectible without regard to retention of membership, and hence, so I had assumed the Government's position to be, this action took the fine outside the inner compass of the membership relation.

Confirming me in that impression was the conclusion of a colloquy initiated toward the end of the third day of hearing. The Government, as part of its own case was still developing, in some detail, the history of the production rule and its administration at the Employer's establishment. Since counsel for the Government and for the Union were anxious to have these matters developed, and I thought it would serve a useful purpose in presenting the living situation out of which the issue arose, Government counsel were permitted to develop this matter as part of their own case. At the stage where it seemed that that expository purpose had been served, I inquired as to the need for further elaboration of the subject. Government counsel indicated that it was intended as anticipatory refutation of certain assertions in the answer to the effect that the rule was administered with employer knowledge and acquiescence, and that it had beneficial consequences.

Since Government counsel disclaimed that the negation of such assertions was a part of the Government's theory of liability, there ensued the colloquy which confirmed my original assumption concerning the government's theory as previously described—as follows:

TRIAL EXAMINER: ... Wouldn't it be in point then to ask you what are you challenging? Are you challenging the fact that the Union in its councils had set a production ceiling? I would ask you that and what would your answer be?

MR. BLACKBURN: My answer would be no.

TRIAL EXAMINER: Are you challenging the fact that the Union in its negotiations with the Employer seeks to have the employer go along with the production ceiling? Would you challenge that?

MR. BLACKBURN: No I would not challenge that.

TRIAL EXAMINER: ... Suppose the union passes a resolution that an employee, pardon me, any member who doesn't cooperate in the production ceiling program will lose his eligibility for membership, nothing more. Would you challenge that?

MR. BLACKBURN: No. I would not challenge that.

TRIAL EXAMINER: But isn't it a fact that what you do challenge is that the sanction for the fine goes beyond expulsion from membership and extends to the realm of an absolute obligation on the part of the member to the Union?

MR. BLACKBURN: Yes. (Emphasis supplied.)

The briefs indicate that I had perhaps not accurately gauged the position of the proponents. They do not seek to distinguish Minneapolis Star. Rather do they ask that the doctrine of that case be rejected in the light of an opinion in a case decided last year by the Seventh Circuit. That is the Court which had earlier sustained the Board in the ITU case (supra, n. 6), which provided the underlying rationale of the Board's decision in Minneapolis Star. The case in question is Allen Bradley Co. v. N.L.R.B., 286 F.2d 442. Although the issue there concerned not an alleged violation by a union, but by an employer, a portion of the opinion is devoted to a discussion of the same type of issue as in Minneapolis Star, and expresses a different view from the one embodied in that case—in short, that the assessment of a fine on a member for disobeying a rule against strikebreaking is not immune under the proviso of 8(a)(1)(A) but is a violation of its prohibition.

In urging that the doctrine of Minneapolis Star be rejected in favor of the dictum expressed by the Court in Allen Bradley, Counsel for the Charging Parties indicates outright that this would require a reexamination of controlling doctrine, as embodied in Minneapolis Star. While Government counsel suggest that inroads have already been made upon that doctrine by the Board itself in later decisions (which, as later indicated, infra n. 50, happens not to be so), the press release (R-818) issued by the General Counsel at the time the complaint was authorized indicates that the purpose thereof was to have the doctrine reexamined in the light of the Allen Bradley dictum.

The normal policy in such an instance, is for the Trial Examiner to apply controlling doctrine, and dispose of the request for reexamination as a matter "appropriately to be addressed to the Board." However, in view of the source of the request and the factors presented for de novo consideration, there is warrant for departing from normal

^{8.} Florence Brooks, 131-NLRB 756, 773 (1961).

APPROVED BY THE INTERNATIONAL UNION, UNITED AUTOMOBILE, AIRCRAFT AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA - (CIO)

Harvey Kitzman, Director Region 10 Walter F. Cappel, International Rep.

James Stern - International Rep.

[Signatures omitted in printing]

GENERAL COUNSEL'S EXHIBIT No. 24

			Day Rate	· N	Rate	Ceiling Per Hour	Ceiling For 8 Hours			
GRADE	1		\$2.24		\$2.455	\$2.90	\$23.20			
"	2	4	\$2.155		\$2.37	\$2.835	\$22.68			
44	3	,	\$2.065	-	\$2.28	\$2.755	\$22.04			
	4		\$1.985	- +	\$2,20	\$2.685	\$21.48	9		
3	.5		\$1.90		\$2.115	\$2.62	\$20.96			

An additional 10¢ Cost of Living is added to each hour worked.

RESPONDENT'S EXHIBIT No. 8

CONSTITUTION

of the INTERNATIONAL UNION
UNITED AUTOMOBILE, AIRCRAFT

AND

AGRICULTURAL IMPLEMENT WORKERS

OF AMERICA.

F AMERICA,

UAW .

Adopted at ...

Atlantic City, N. J.

October, 1959

ARTICLE 30

Trials of Members

Section 1. A charge by a member or members in good standing that a member or members have violated this Constitution onengaged in conduct unbecoming a member of the Union must be specifically set forth in writing and signed by the member or members making the charges. The charges must state the exact nature of the alleged offense or offenses and, if possible, the period of time during which the offense or offenses allegedly took place. Two (2) or more members may be jointly charged with having participated in the same act or acts charged as an offense or with having acted jointly in commission of such an offense and may be jointly tried.

SECTION 10. The Trial Committee, upon completion of the hearing on the evidence and arguments, shall go

A two-thirds (%) vote shall be required to find the accused guilty. In case the accused is found guilty, the Trial Committee may, by a majority vote, reprimand the accused; or it may, by a two-thirds (%) vote, assess a fine not to exceed one hundred dollars (\$100) with automatic suspension, removal from office or expulsion in the event of the failure of the accused to pay the fine within a specified time; or it may, by a two-thirds (%) vote, suspend or remove the accused from office or suspend or expel him from membership in the International Union.

INTERMEDIATE REPORT AND RECOMMENDED ORDER

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF TRIAL EXAMINERS
WASHINGTON, D.C.

LOCAL 283, UNITED AUTOMOBILE, AIRCRAFT AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW-AFL-CIO (WISCONSIN MOTOR CORP.)

Respondent

and	Case Nos. 13-CB-T059-1
DUSCELL SCOPIELD on individual	13-CB-1059-2
RUSSELL SCOFIELD, an individual, LAWRENCE HANSEN, an individual,	13-CB-1059-3
EMIL STEFANEC, an individual,	. 13-CB-1059-4
GEORGE KOZBIEL, an individual,	

Charging Parties

Benjamin K. Blackburn and Lawrence F. Doppelt, Esqs., of Chicago, Ill., for the General Counsel.

Max Raskin and Herbert Bratt, Esqs., of Milwaukee, Wis., and Lowell Goerlich, Esq., of Washington, D.C., for Respondent.

Edward J. Zahn, Jr., Esq., of Karcher & Zahn, of Burlington, Wis., for the Charging Parties.

Before: A. Norman Somers, Trial Examiner.

Statement of the Case

This proceeding was heard before me in Milwaukee, Wisconsin, on January 9 to 12, 1962, on complaint of the General Counsel and answer of Respondent. The issue was whether Respondent Union, in assessing fines upon certain of its members, who work for Wisconsin Motor Corporation, for exceeding certain production ceilings established under a rule of the Union, and in thereafter instituting civil suit in a State court to collect them, violated Section 8(b) (1) (A) of the Act.

The parties waived oral argument at the close of the hearing, but there was a good deal of discussion of the issue before then, largely in the course of my efforts to

^{1.} Procedural chronology: The charges were filed May 18, 1961; the original Order of Consolidation and Complaint was issued December 1; and the Amended Order of Consolidation and Complaint (Hereafter termed "the complaint") was issued December 11, 1961.

obtain definitive statements of the opposing legal positions, and to shorten the hearing in the light of them. Also, the parties have filed briefs which have been duly considered. Upon the entire record, and my observations of the witnesses, I make the following:

Findings of Fact

I. The business of the Employer

Wisconsin Motor Corporation, hereinafter referred to as the Employer or the Company, is a Wisconsin corporation, having its plant and place of business in West Allis, Wisconsin, where it manufactures, sells and distributes motors. In the course of its operations it ships products directly to points outside the State in excess of \$50,000 annually, The Employer is conceded to be in a business affecting commerce and the propriety of the Board's asserting jurisdiction in this case is not in contest.

II. The labor organization involved

Respondent, Local 283 of UAW-AFL-CIO, referred to as the Union, is a labor organization within the meaning of the Act. Its membership consists exclusively of employees of the Employer, with whom it has had contractual relations continuously since 1937, the current contract being in force since May 1, 1959.

III. The alleged unfair labor practice

A. The issue (including a synopsis of its aspects at the hearing, and thereafter in the briefs)

On April 8, 1961, the Union assessed a fine upon the charging parties, as members of its organization, for

^{2.} As corrected on notice to the parties, and as supplemented by an exhibit proffered by Respondent after the hearing, which was added to the record without objection.

violating its long-standing rule relating to "production ceilings," and on October 2 of the same year, it brought suit in the state court to recover the amounts of the fines. The proponents of the complaint contend that by these actions the Union violated Section 8(b)(1)(A) of the Act, which declares it to be as unfair labor practice for a labor organization "to restrain or coerce employees in the exercise of their rights guaranteed in Section 7 [of the Act]." Contrariwise, the Union contends that its conduct in each instance is immune under the proviso of 8(b)(1)(A), which declares that "this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein."

The legal issue thus presented could well be decided on the basis of the facts presented in the opening sentence above. At least one would have thought so under the body of authoritative Board and Court doctrine interpreting 8(b)(1)(A) and its proviso over the 15 years since enactment of the Labor Management Relations Act (the Taft-Harfley Law) of 1947. Yet the history of the rule and the manner of its administration at this Company's establishment from its genesis in 1944 consumed nearly all of the government's 4-day presentation of the case. They will also receive substantial treatment in our ensuing factual discussion. The reason is stated below.

Throughout the hearing, I had assumed that in claiming that the fine here offended 8(b)(1)(A), the Govern-

^{3.} This includes, apart from the General Counsel, also the Charging Parties, on whose charges the complaint was issued, and who have been ably représented by separate counsel.

^{4.} Sections 7 and 8(b)(1)(A) are quoted in Appendix A, attached to this Report. Included also are other provisions of the Act, which bear upon the issue here to be decided.

⁶¹ Stat. 136, hereafter referred to variously as "the Act" or "LMRA."

policy here. In this kind of situation, it would seem appropriate that the matter come before the agency after preliminary consideration thereof at the initial level of the Board's adjudicative process. And so the various contentions in support of the requested reexamination of controlling doctrine will be considered here.

Insofar as both proponents take a common position in urging the rejection of the doctrine of Minneapolis Star in the light of the Allen Bradley dictum, the matter will be treated in parts (1) through (8) of the Conclusionary Discussion. And although, so far as appears, proponents do not rely on it, for purposes of completeness of treatment, we will also at the outset of the Conclusionary Discussion consider the theory of liability as I had originally assumed it to be, based upon the single factual variance here from Minneapolis Star, previously described.

It should be said, however, that apart from the position thus taken in common with counsel for the Charging Parties, Government counsel urge upon us a drastic revision of established conceptions concerning the scope of the issue before us and of our attendant powers in respect thereto, which goes beyond anything suggested in the Allen Bradley dictum. Its reach extends not only beyond Minneapolis Star but ITU as well. It envisages a power in us to pass upon whether a union rule is "reasonable," under a test which includes an appraisal of its social desirability. We treat this aspect of the Government's position-from which counsel for the Charging Parties expressly dissociates himself-in part (9) of the Conclusionary Discussion.

In view of the broadened front on which Government counsel thus present the issue, the factual exposition of the origin, purpose and manner of administration of the rule here in question at the Employer's establishment will be

given in a bit more detail than had originally been envisioned as necessary for treating the narrow legal issue here involved.

- B. Nature, history and operation of production ceilings plan at the Employer's establishment
 - I. The union-security provision in the contract

The Union, as stated previously, is composed entirely of employees of the Company and has had contractual relations with it since 1937. The current contract, like those for a number of years preceding, provides that as a condition of retention of employment, each employee, after the requisite 30-day period, has the option of either joining and maintaining good standing in the Union, or rejecting membership but paying the Union a "service fee."

2 Scope of the production ceilings rule

The "production ceilings" rule applies to those members who are employed by the Company on jobs compensated on the piecework, or "incentive" basis. These comprise little over half of the working force, which currently is about 850.9 The "ceiling" sets a limit not on production as such but on the hourly rate that the pieceworkers shall earn in excess of the minimum rate as guaranteed them under the contract. By way of explanation, the pieceworkers, while paid on the basis of the price per piece produced, are, in actual fact, under the contract, guaranteed a minimum rate per hour for any given job. This is called the "machine" rate. The machine rate varies for

^{9.} The remainder work on a "flat" time basis. The jobs compensated on the incentive basis are those capable of being timed, as distinguished from those not lending themselves to such process, such as cleaning, repairing machinery, etc.

each of the five "labor grades" into which a job falls, the highest being for grade 1, which requires the most skill, and so on in descending order of requisite skill and attendant "machine" rate per hour down to grade 5.9a

The subject of the contractual negotiations between the Employer and the Union, insofar as they concern the pieceworkers, is the guaranteed "machine" rate per hour for each of the five labor grades. The machine rate as fixed by the contract is translated into the picework rate under ' a process called "factoring in." The formula for doing so when a raise in hourly rate has been agreed upon, and the rate that ceiling itself plays in it, will engage our attention in due course, but the governing principle is expressed in the contract as follows:

Jobs shall be so priced as a result of a time study that the average competent operator working at a reasonable pace shall earn not less than the machine rate of his assigned task.

The machine rate makes allowances for factors such as setting up the job, picking up and loading, cleaning of tools, fatigue, attention to personal needs, etc. An incentive worker who earns the machine rate is regarded as having met the minimal requirements for satisfactory performance. To the extent that he foregoes the allowances previously mentioned and converts them into productive effort, he can, on the basis of the piece rate as established ander the "factoring in" process, earn more than the hourly machine rate. The setting of a limit or a "ceiling" upon earnings thus made in excess of the machine rate is what the rule here involves.

⁹a. There is an even lower rate, called the "day" rate for each grade, which applies to periods when through no fault of the Company the incentive worker is not engaged in actual production or has produced "scrap." This does not concern us here.

3. Adoption of the production ceilings rule and its modifications

The production ceiling rule was formally adopted by vote of the membership in 1944. It had its forerunner as a "gentlemen's agreement" among them since 1938, when the Union's executive board recommended that "pieceworkers turn in no more than time and half in any one day in order to conserve work and avoid layoffs."

The resolution of 1944 was to the effect that "the men turn in no more than 10 cents per hour over and above the new machine rates." In 1946, the membership voted penalties, in the form of fines, for violation of the rule. From time to time the rule has undergone modifications, and has its current embodiment in the following language:

- A. The basic object of the Union is, to pretect members of the Union in their employment and to give them as much security as the industry can provide. The Local Union in its judgment and reasoning has established a production ceiling which it feels will bring more protection to the members. It follows that a member who is found in violation of this rule is guilty of conduct unbecoming a union member.
- B. Any member who violates these ceilings shall be subject to a fine of one dollar (\$1.00) for each violation. The violators shall be processed by not less than 3, nor more than 5 members of the Executive Board.

In case of persistent ceiling violations, the member will be charged with conduct unbecoming a Union Member. 10

^{10. &}quot;Conduct unbecoming a Union Member" is the generic offense cognizable under Article 30 of the constitution of the International. Under a detailed procedure of charges, trial and penalty. The penalty includes suspension and a fine ranging from \$1 to a maximum of \$100. The same article prescribes that failure to pay the fine within a prescribed period can result in expulsion from the Union.

The amount of the ceiling has been raised over the years as a result of collective negotiations with the Employer, to be described later. The ceiling currently in effect is between 45 and 50 cents above the machine rate (infra, n. 11).

> 4. What compliance with the ceiling rule entails: the process of "banking."

The expression "turn in" as used in the resolution does not apply to the pieces produced. These, when made, are turned over to the Company and physically enter the flow of its operations. Nor does it apply directly to the pace at which the worker is to produce. It applies solely to what the operator is to enter on his work card for purpose of payment. If he has produced at a pace yielding him an hourly rate above "ceiling," he holds back reporting to management the quantity in excess of what will earn him the ceiling rate. This is done under a process called "banking," which is described below.

The "bank" is the employee's own record of the production yielding him in excess of the ceiling rate. This he keeps in reserve for a "rainy day," i.e., when he has earned less than ceiling. This last can occur when he has been absent, or when his machine is "down," and he is forced to be idle. For that idle period, he would, under the contract, normally receive his machine rate (and under certain circumstances not here pertinent, even the lower "day" rate (supra, n. 9a; infra, n. 11). However, by drawing upon his reserve or "bank," he can make the ceiling rate. When he does so, the Company pays him for the now reported items previously produced, and is spared any other outlay for the idle period. It should be explained that although, as a member of the Union, a pieceworker is required under the ceiling rule thus to "bank" his excess. as an employee, he is permitted by the Company to exercise

his choice either way. The Company does not require that the employee follow the ceiling rule, nor has it ever bound itself contractually to require the employee to do so. If the employee chooses to follow the rule, the Company will honor his choice by permitting him to "bank" his excess (subject to all "banks" being emptied by inventory time). On the other hand, if he chooses to disregard the rule, and to report and be paid for his entire production, the Company will gladly pay him, however much above the ceiling rate this will bring his earnings. But when he has done so as an employee, then so far as the Union is concerned, as a member, he has violated the production ceiling rule, and that is what constitutes the "conduct unbecoming a union member" (supra, n. 10), which is the subject of the fine.

5. Implementation of the Rule: inspection of work records

The process of checking upon compliance with the rule, in use from the time that the penalties were first enacted in 1946, is as follows: Twice a year, the Union procures from the Company the work-cards, for a given day chosen a random, of every one of its members who are engaged in piecework. The cards are then distributed among the various stewards, who eheck them to ascertain whether a member's earnings as reported have exceeded the ceiling. for his grade as it appears in a posted schedule.11 He then

^{11.} That schedule is prepared by the Union, but for purposes later appearing, management retains copies for its own reference. The current schedule of rates as follows:

	Day Rate	Machine Rate	Ceiling per hour	Ceiling for 8 hours
Grade 1	\$2.24	\$2.455	\$2.90	\$23.20
Grade 2 Grade 3	2.155 2.065	2.37 2.28	2.835 2.755	22.68 22.04
Grade 4 Grade 5	1.985	2.20	2.685	21.48
Grade J.	1.90	2.115	2.62	20.96

turns over to the Union the cards of those members showing earnings in excess of ceiling. The Union then procures from the Company copies of the work cards of those persons for the entire preceding quarter year, to ascertain the extent to which during that period, they exceeded ceiling. They are then called before a trial board and asked if they concede the accuracy of the data on the cards. If they do, they are asked for an explanation, and if the explanation is unsatisfactory, they are served with charges and tried before a trial board. The trial board then determines whether these members have thereby been guilty of "conduct unbecoming a union member" and, based upon the degree of "persisten[cy]," fixes the penalty within the limits previously described (supra, n. 10). It is then reported to the membership for approval, and when that is given, it takes effect.

That was the procedure which was followed in the cases of the Charging Parties. A random card check made on February 14 and 15, 1961, showed that they and two others had exceeded ceiling during the last quarter year. On March 2, 1961, each was served with charges of having engaged in "conduct unbecoming a union member," supported by a detailed description of violations of the rule, described therein as "deliberate and persistent," and notified that a trial committee would be selected at a meeting of the membership, at which he could appear with counsel. After trial held on notice, they were informed of the verdict and told that it would be presented to the full membership for approval, and on April 11, they were notified of the membership's approval of the verdict and the recommended penalty, which included a year's suspension from membership and a fine payable within 30 days. Charging Parties Scofield and Kozbiel were assessed the maximum fine

permissible under the U.A.W.'s Constitution, of \$100, Hansen \$75 and Stefanec \$50.12

6. The Employer's role in the administration of the ceiling program; and the role of ceiling in the wage structure

Much of the Government's brief is devoted to the proposition that the Employer has never "agreed" to the production ceiling rule and that the production ceilings are, as indeed the complaint alleges, "unilaterally" established by the Union. The matter is hardly germane. Every union rule originates with it and is thus unilateral in its very nature, so that if enforcement thereof were vulnerable for that reason, it is difficult to see what function the proviso to 8(b)(1)(A) could serve.

However, for whatever importance Government counsel attach to the matter, it would appear rather clear that the details of the administration of the rule hardly lend themselves to characterization on this all-or-nothing basis. The rule has a unilateral source, but its administration has numerous bilateral aspects. The description even as thus far given reveals a role played by the Company which is rather vital to its effectiveness. We may assume, without deciding, that management, if it insisted, could reject the "banking" process and require every pieceworker to report

Parties appealed to the International and were advised that under the Constitution the fine must be paid before the appeal could be entertained. They then filed the charges with the Board's Regional Office, which were dismissed by the Regional Director on August 22, 1961. The Union on August 25, 1961, then wrote demanding payment under threat of suit, which, as stated previously, was brought on October 2. On November 22, 1961, the office of the General Counsel in Washington directed issuance of the complaint in this proceeding (press release R-818).

and be paid for his full production on a current basis. Yet it leaves the choice either way with the employee, and, with. full knowledge of its purpose, it supplies the Union with the work cards used in making the semiannual check on compliance with the rule. Further, it recognizes the time spent by the stewards in making such a check as being on legitimate union business, which under the contract, stewards may engage in without loss of pay.

Even more significant would appear to be the mutual recognition of the ceiling rate as an integral part of the wage structure. Among the subjects embraced by the contract negotiations is the setting of the ceiling rate. The purpose of doing so is to bind not the Employer but the Union. The Employer retains its freedom to pay any member who reports production yielding him in excess of ceiling, but the Union binds itself in respect to the limit which it will permit its members to earn above the guaranteed machine rate. The higher the ceiling the greater the productive leeway. And so in the typical negotiations, the Employer begins by asking the Union to agree to eliminate the ceiling, and as the second alternative, proposes a raise in the ceiling. As an inducement therefor, it may offer a concession in the form of a raise in the guaranteed hourly machine rate, and the raise in turn conditions the extent to which the Union will agree to raise the ceiling. Exemplifying this process are documents reflecting the negotiations for specific years of 1953 and 1956-in 1953 during a contract reopening period, and in 1956, in the course of contract renewal discussions culminating in a strike over certain unresolved issues. The latter included the extent to which the Company would go in raising the hourly machine rate and the extent to which the Union would go in raising the ceiling. The 1956 strike settlement agreement shows a compromise reached in respect to each item, the Employer agreeing to a raise in the guaranteed

hourly rate, and the Union, in turn, agreeing to raise the ceiling.

The ceiling rate is the common point of reference used by management and the Union in two other vital respectsfirst in the manner of "factoring" the hourly rate raise into the piece rate, and secondly in passing upon grievances over allowances on specific jobs. As to the first, the raise in the piece rate is determined on the basis of the ratio which the raise in the hourly machine rate bears to the old ceiling rate. This was spelled out in an elaborate formula prepared and posted by management after the agreement of 1953; and in the 1956 strike settlement agreement, it was specifically provided that that same method would be used in "factoring in" the hourly rate raise granted that year. As to the second, the record includes writings showing management to have disposed of grievances of employees concerned with allowances on specific jobs, on the basis of whether other employees had or had not made "ceiling" on them.

7. The opposing viewpoints toward ceiling as expressed at the bargaining table and repeated at the hearing

The status thus achieved by the ceiling program is the product of hard bargaining, however diverse the philosophies voiced at the bargaining table by the respective representatives and repeated by them at the hearing.

Their differing statements of position exemplify the polarity of management and labor viewpoints on incentive or piecework plans, as described in the host of authoritative treaties on the subject. (See Appendix B; Van De Water, pp. 107-108) It hardly matters whether one accepts all, some or none of the underlying economic premises of either side, for, as indicated in the Conclusionary Discus-

sion (part (9)), that is normally left to the parties to work out for themselves in a free society, until the legislature takes cognizance of and acts on a given practice.

On the one hand, the Union justifies the ceiling rule on the basis of apprehensions, which, as the literature on the subject would indicate, have their roots in industrial experience with incentive plans of earlier vintage, some of which have been acknowledged by management spokesmen as having been reasonably grounded. (See App. B, Louden, pp. 105-106) These include expressed concern that a stepped up pace could result in: (a) employees working themselves out of jobs, (b) usher in the evil of "stakhanovism," under which a new productive norm is set, whereby the piece rate is lowered and the compensation for actual productive effort correspondingly reduced, (c) lower grade employees by excessive dissipation of their allowances, earning more than those in the higher ones, thus dislocating the actual pay scale and bringing about morale-threatening jealousies, as well as undermining the health-protecting purposes of the allowances.

The management tune is a different one. Its representatives assert that it is wrong not to let the members "earn as much as they can," and during negotiations, they counter the Union's demand for an increase in hourly pay rate with the suggestion that the employees can earn more by producing more under the rate currently in effect—the very thing which to the Union conjures up the specter of stakhanovism. They state also that it is only a matter of time before the pieceworkers catch up with a raised ceiling, and when they do so, all except those who choose to defy the rule, shut off their machines during the latter part of the day, well before punching out time; additionally, there is a mass idleness when the "banks" are emptied out before inventory time, or before the vacation period; and finally,

if the men produced to their full capacities and were paid accordingly, the fixed overhead being the same, the Company's unit cost would be lessened and its competitive position strengthened.

Government counsel present these statements of management, including the conclusionary assertion "we never agreed to ceilings," as the very distilled essence of management's position. In so doing, they fail to make due allowance for the adage in folklore, given to status also in. adjudicative doctrine, that "actions speak louder than words."13 Management's assistance in the administration of the plan, while indeed stemming from its realization that it has the overwhelming support of the rank-and-file, may well be due to a greater sympathy with some of its objectives than is reflected in its broadsides at the negotiating table. This may be for reasons of its own self-interest, quite apart from the fact that some people high in its management ranks, such as Plant Superintendent Bohmann and Assistant Superintendent LaSage, underwent considerable exposure to the rank-and-file point of view when they were union functionaries during the presupervisory stages of their careers with Wisconsin Motor. One watching Superintendent Bohmann and President Todd, as they expressed their pride in the Company's highly superior product and extraordinarily low scrap rate, for which they gave ungrudging credit to the workmanship of the incentive force, rather got the impression that if there were no production ceiling set by the Union, management would be inclined to devise some equivalent manner of its own to insure the continued high quality of the performance. Strongly suggesting it was Plant Superintendent Bohmann's

^{. 13.} St. Louis Independent Packing Co. v. N.L.R.B., '291 F.2d 700, 705 (C.A. 7, 1951); N.L.R.B. v. Ritzwoller, 114 F.2d 422, 436 (C.A. 7, 1939).

acknowledgement that this preeminently low scrap rate could well be imperiled if the pieceworkers became obsessively preoccupied with production.

Also, other admissions made by these officials, as well as their general demeanors, would indicate that they are less worked up about the production ceiling plan than, if one were to take at face value the sweeping diatribes against it in their brief, Government counsel would appear to be. Thus Bohmann, apart from acknowledging that there was a saving to the Company when the employee. draws on his "bank" for compensation during a "down" period instead of receiving his machine rate, also acknowledged that the ceiling enables the Company to forecast the maximum production of the various departments and that "by such process it assists [the Company] in the integration of the operations and in the final production of the product." On that score, he expressed further pride in the fact that the average hourly earnings of the incentive workers of the Company under the ceiling plan exceed those of employees in comparable industrial establishments in the region. This rather indicates that their productivity compares favorably with that of the work forces in the other establishments. And President Todd, who generally reflected the mellowing influence of his long years, when asked by Government counsel the reason for certain competitive difficulties of the Company, gave as his first answer not added costs under the production ceiling, but salesmanship—the task of educating the market to a due appreciation of the advantages of a superior product of world renown over an ordinary one, which would more than compensate for the higher price paid. He then testified that reduction in unit costs would help too; whatever its source. Union counsel apparently sought to claim as another laurel for the ceiling plan an admission by Presi-

dent Todd that since 1946, which happens to be the year. when the Union began to enforce the ceiling rate, the Company, after prior periods in the red, has paid dividends uninterruptedly. In so doing, I would think that counsel waded rather knee-deep into the post hoc fallacy; but human nature being what it is, it may be assumed that management does not hold that coincidence against the program.

It is true that management does feel that there is toowide an interval of idleness between the ne of day the incentive workers have produced enough to earn the ceiling rate and the end of the shift. But that bears on two basic subjects which are the staples of the bargaining process-namely, (a) the adequacy of the hourly machine rate, as fixed by the contract, and (b) assuming agreement as to the first, the adequacy of the ceiling itself. Each is typically a subject of interest-conditioned viewpoint whose reconciliation is the very purpose of the bargaining process.

As to (a), we have quoted the clause of the contract, which indicates that the guaranteed hourly rate reflects the minimal productive expectancy of a worker of average competence working at a normal pace. This, as the clause indicates, as based on a time study. The clause itself is the oephing section of a comprehensive article of the contract (XI) containing detailed procedures for retiming jobs on the basis of time studies. So far as appears, the Company has not complained that the guaranteed hourly rates have been so set that the employee, for the pay he receives, has not given the requisite quid pro quo in production.

As to (b), the Company's objective in seeking agreement from the Union for a higher ceiling is, in the light of (a) above, not based upon any claim that under the ceiling it receives less production than what it is paying for. The subject of negotiations in respect to the ceiling is the extent

to which the employees should convert their allowances to productive effort for the purpose of earning more. This involves striking the balance between, on the one hand, management's interest in having pieceworkers produce and earn to the maximum of their capacities, and on the other, the interest of the group as a whole in determining the point at which those comprising it can avail themselves of that inducement consistently with preserving the basic. purpose of the allowances themselves.

In essence, therefore, bargaining over the ceiling rate concerns the extent to which the group as a whole can be induced to forego these allowances in exchange for compensated productive effort. This is manifestly a matter affecting the interest of the group and in which its collective bargaining strength hinges upon the cooperation of its individual components.

The measures which the group, in the person of the union, may, consistently with the Act, exert upon the individual, in the person of the member, to conform with the policy adopted by the group, and the kind of measures which it is forbidden to exert for that purpose is the subject at issue. The remainder of this document will be devoted to it.

C. Conclusionary discussion 13a

(1)

Controlling doctrine has been reexamined in the light of the purpose of the proviso as manifest on the face of the

¹³a. There will be no discussion of the Union's additional defense that the complaint is barred by the 6 months limitation provision of Section 10(b), other than to say that I adhere to my original ruling rejecting it. The fact that the rule for which the fine was assessed originated more than 6 months before the filing of the charges would not bar prosecution for the assessment, which occurred within the 6 months period. Local Lodge No. 1424 v. N.L.R.B., 362 U.S. 411, on which the Union relies for that defense; is not applicable here.

statute and as declared by the sponsors of 8(b)(1)(A) during its enactment. These are discussed in the ensuing subsections. Upon such reexamination, and for the reasons later stated I conclude that the scope of the prohibition of Section 8(b)(1)(A) as limited by the proviso has been correctly interpreted by controlling authority, as embodied in the decisions in ITU (ANPA) and Minneapolis Star (supra, n. 6 and 7). The result is that the rule here, and the discipline imposed as a sanction for it being part of the internal affairs of unions, are not within the scope of 8(b)(1)(A), as limited by the proviso. Accordingly, the Union did not violate Section 8(b)(1)(A) in assessing the fine for disobedience of its rule.

Neither did the Union violate 8(b)(1)(A) by suing in the State court to collect the fine. This last is so for reasons quite apart from, and without regard to whether the assessment of the fine itself would violate 8(b)(1)(A). The reason is that in such matters, it is Board policy to "accommodate its enforcement of the Act to the right of all persons to litigate their claims in court, rather than condemn the exercise of such right as an unfair labor practice." Clyde Taylor Co., 127 NLRB 103, 109. The presumption in such instance is that the State courts can be relied upon to give due effect to whatever law controls, and hence there would have been no need to enjoin the suit even if it had been based on a claim in conflict with or otherwise preempted by Federal law. See Amalgamated Clothing Workers v. Richman Bros., 348 U.S. 311 (1955). Neither of these is the case.

(2)

As more fully developed in part (8) below, the conclusion, hereafter discussed, that the assessment of the fine was not a violation of 8(b) (A) (A) does not imply that such conduct is affirmatively protected by the Act. It

means merely that the conduct has not been subjected to regulation under the Federal statute. The effect of the immunity under the proviso is thus to leave the internal union-member relationship in respect to the matter here at issue subject exclusively to State law. This last bears upon the one element of factual difference here from that in Minneapolis Star which, as I have stated in the introduction. I had assumed had been the basis of the government's position-namely, that the Union here has asserted the fine as a debt, without exercising its power under the constitution (supra, n. 10) of making it payable under pain of expulsion. Although, as I have also noted in the introduction, the proponents do not appear to rely upon this variance from Minneapolis Star, I have considered it preliminarily for purpose of completeness of treatment. After such consideration, I conclude that the same principle controls here as in Minneapolis Star and ITU. This is because, as amplified later, Congress, in declaring the internal affairs of unions immune under the statute, left them where it had found them-outside the Federal policing power and subject to the laws and policies of the individual States. Accordingly, the dispute between the Union and the Charging Parties out of which this proceeding has arisen concerns the rights and obligations of unions and their members in respect to each other. As already stressed and as will be discussed in more detail in part (8) below, that field is not reached by our statute, and is governed by State law. The Supreme Court of the State of Wisconsin construes a "union's constitution and bylaws [to] constitute a contract between the union and its members,"14 The Supreme Court of the United States observed in the

U. A. W. v. Woychik, 5 Wis. 2d 528; 93 N.W.2d 236; 43 LRRM 2741.

Gonzalez case15 that "this contractual conception of the relation between a member and his union widely prevails in this country." And so the matter of whether a union is limited to making a fine a mere further condition of membership or may press for its payment as a debt without regard to retention of membership is a subject of State law: it involves the interpretation and effect which the courts of a given jurisdiction will give to the financial obligations arising under the union-member relationshipwhether they be dues, special assessments, or disciplinary fines. On that point, it happens also that the Supreme-Court of the State of Wisconsin, applying its previously enunciated premise that the "constitution and bylaws . . . constitute a contract," (Woychik case, supra, n. 14) has held that the obligations incurred by a member pursuant thereto are collectible as a debt. That is so with respect to ordinary dues,16 and also with respect to a disciplinary obligation, such as a fine, as in the Woychik case—the fine in Woychik having been, in fact, for violation of the same kind of rule as in Minneapolis Star, one requiring observance of a strike.

The above considerations, however, hardly conclude the issues in the suit in the State court between the Union and the Charging. Parties. The record indicates that the suit involves a miscellany of disputed issues between them concededly out of our concern on any basis—such as the validity of the ceiling rule itself under the Union's constitution and bylaws, as well as of the penalty, and indeed, whether the latter is truly a debt as opposed to being a mere added condition of membership under the terms of

^{15.} International Ass'n of Machinists v. Gonzalez, 356 U.S. 617, 618 (1955).

^{°16.} Local 261 U. A. W. v. Schulze, 3 Wis. 2d 562; 89 N.W.2d 191. 42 LRRM 2177 (1953).

the constitution. All of these matters, including the validity of the substantive ground for the imposition of the penalty under State law or policy, are outside our purview and are matters to be resolved by the duly constituted tribunals of the State in applying its own law and policy.

(3)

If we are right in construing the proviso as negating on intention to interfere with the internal affairs of unions, that should dispose of the two grounds advanced by the proponents for overruling the doctrine of Minneapolis Star. The first is that a fine does not fall within the category of "rules with respect to the acquisition or retention of membership," and the second is that even if it does, it still constitutes coercion within the meaning of 8(b)(1)(A), because it is a sanction for a rule which places a restriction on the manner in which members shall work on their jobs.

Each proposition is based on the dictum of the Seventh Circuit in Allen Bradley to be treated later, but at this stage, it is appropriate to observe that the argument, in each of its facets, misconceives the scope of both clauses of 8(b)(1)(A). It interprets the prohibiting clause too broadly even apart from the proviso; and it interprets the proviso too narrowly. We treat each in that order.

As to the first, the proponents construe the prohibiting clause as having the purpose of interdicting any union action of any character, which by inference can be said to have a restraining or coercive effect on employees' organizational rights under Section 7. The legislative history, treated later, shows the clause was not intended to have that broad a reach. That was the basis of the Supreme Court's decision rejecting the Board's doctrine in Curtis Brothers relating to the application of 8(b)(1)(A) to

picketing by a minority union to compel recognition.17 The Curtis Brothers doctrine was enunciated by the Board before Congress enacted the Labor Management Reporting and Disclosure Act of 1959,18 which, under the amendments to our Act as embodied in Title VI of that law, specifically covered that subject in present Section 8(b) (7) of our Act. In Curtis Brothers, the Board had held that picketing by a minority union for recognition was a violation of 8(b)(1)(A). The ground was that if the union achieved its purpose, it would saddle the employees with a bargaining agent not of their own choosing, contrary to their rights under Section 7, thereby restraining and coercing them in the exercise of those rights. The Court held that the broad "reach" thus given 8(b)(1)(A), even if "the words might permit" it, was negated by the legislative history showing it to have had a more limited purpose. Expressing its agreement with the "Board's own interpretation" of 8(b)(1)(A) in an earlier line of cases beginning with National Maritime Union, 10 the Court concluded that "§ 8(b)(1)(A) is a grant of power to the Board limited to authority to proceed against union tactics involving violence, intimidation and reprisal or threats thereof."

The above undermines the premise that the prohibiting clause of 8(b)(1)(A) has a legal scope as broad as its language even in respect to conduct not involving the proviso. As to the proviso, it may be said that until Allen Bradley, it was uniformly interpreted by Board, Courts, and legal commentators as excepting from

^{17.} N.L.R.B. v. Drivers, Chauffeurs, etc., Local 539 (Curtis Brothers), 362 U.S. 274 (1960), setting aside 119 NLRB 232 (1957).

⁷³ Stat. 519, hereinafter referred to as the LMRDA. 18.

⁷⁸ NLRB 97 (1948), enfd. 175 F.2d 686 (C.A. 2) (1949).

the prohibiting clause conduct involving the internal relations of unions with their members. On that basis the Board in the ITU case (supra, n. 6) held that the Union there did not violate 8(b) (1) (A) in requiring its members under penalty of expulsion, to work only under closed shop conditions, laid down by it on employers. This was so even though the Board held that in laying down these conditions upon employers, the Union had violated Section 8(b) (2) (quoted in Appendix A of this Report) which forbids unions to cause or attempt to cause employers to discriminate against employees in violation of Section 8(a)(3) (also quoted in Appendix A). On the same ground, the Seventh Circuit, on review of the Board's ITU decision in the ANPA case (supra, n. 6), upheld the Board's dismissal of the 8(b)(1)(A) allegation against the Union. Court pointed to the limited scope of the prohibiting clause, stating that "the coercion of employees by a labor organization is illegal only to the extent that it is declared so by Congress" (p. 800), and concluded its discussion of the proviso with the observation that:

... the proviso in § 8(b)(1)(A) permits unions to enforce their internal policies upon their memberships as they see fit. (p. 806.)

The above hardly leaves room for a distinction based upon whether the penalty was expulsion, as in *ITU*, or as in *Minneapolis Star* and here, a fine; and as appears in the legislative history treated in part (5) below, Congress intended none.

The portion of proponents' position which attacks the fine because it is a sanction for a rule prescribing how the members may work embraces a premise which if accepted, would require a result not only contrary to that in *Minneapolis Star*, but overruling *ITU* as well. It is difficult to conceive of a rule more offensive on the score ad-

vanced by proponents than the one in ITU. The rule there did more than just limit the members' exercise of their rights under Section 7: it required them to abet the Union in conduct illegalized by the Federal statute. Hence the exoneration of the Union under 8(b)(1)(A) could only have rested upon a criterion of liability which disregarded the content of the rule and considered only the measures used to enforce it. The enforcing measure being an internal union discipline, the immunity was complete, even though the rule for which it was a sanction could not have more clearly, indeed more flagrantly, prescribed the conditions under which the members should work.

Proponents' argument on both scores overlooks the distinction between the members' rights as employees and their rights as members. The Act protects the first and not the second. This is manifest from the scheme of the Act as a whole, treated in the ensuing subsection, and is confirmed by the legislative history, treated in the one that follows.

(4)

As to what is manifest concerning our issue on the fact of the statute:

The Act on its face shows that a member's rights as an employee are protected from any consequences which a union can visit upon his tenure on the job by virtue of its control over membership. The protection is given by the previously mentioned limits placed by Section 8(a)(3) and 8(b)(2) upon the enforcements of union-security contracts. By these provisions, Congress acted to deprive unions of the power they had over employees' jobs under the closed shop proviso in Section 8(3) of the Wagner Act (49 Stat. 449) through their control over membership. Under the old proviso, a union having a closed shop contract

could deprive an employee of his job by excluding or expelling him from membership, regardless of the cause. To overcome this, Congress in 1947 enacted the 8(a)(3) and 8(b)(2) restrictions upon union-security contracts. Those relevant here as earlier mentioned, forbid an employer to discharge or discriminate against an employee when he has reason to believe the employee has been denied or deprived of membership for any reason other than failure to tender periodic dues and initiation fees; and a union is correspondingly forbidden to cause or attempts to cause an employer to discriminate against the employee in such a situation.

The result of the above, as the Supreme Court put it in the Radio Officer's case,²¹ is to "insulate the employee's job from his organizational rights" by leaving him free as an employee to be a "good, bad, or indifferent" member subject only to his obligations under a union-security contract to tender the requisite dues and initiation fees.

These provisions have been interpreted to give the employee even greater leeway. Under the Board's judicially upheld doctrine in *Union Starch*,²² an employee has met the condition of employment under a union-security contract by tendering the periodic dues and initiation fees, even though he refuses to be a member. In the case before us, the freedom which the Charging Parties enjoy on that score by operation of law is confirmed by the subsisting contract. The pertinent clause, as earlier noted, permits them to pay a "service fee" in lieu of membership.

Colgate Palmolive Peat Co. v. N.L.R.B., 338 U.S. 355
 (1950); DeMille v. AFRA, 31 Cal.2d 139, 187 P.2d 769 (1947), cert. denied 333 U.S. 876 (1948).

^{21.} Radio Officer's Union v. N.L.R.B., 17, 40 (1954).

^{22.} Union Starch and Refining Co., 87 NLRB 779 (1949), enfd. 186 F.2d 1008 (C.A. 7).

Under the Act, therefore, the Charging Parties, as employees were at all times masters of their fate, and still are. They could have avoided putting themselves under obligation to obey any union rule, by availing themselves of the option of tendering dues in lieu of membership. Under the Act, they still have that choice in respect to any obligations toward the Union in the future. However, under the choice made by them the other way, they assumed such obligations as flowed from the contractual relationship thus voluntarily entered into. Its legal effects, as between them and the Union, are governed by the law of the State in which they made their compact. And yet, even in respect to these obligations, the Act protects them, as employees, from any union efforts to enforce them by consequences on their jobs.

Whatever the obligations of the Charging Parties toward the Union as members, they are free agents as employees provided they satisfy their dues obligation. As employees, they can flout the production ceilings rule or any other union rule, even one not prescribing how they shall work, such as one requiring regular attendance at meetings. They can do so, as already stressed, without fear of any consequences upon their jobs. The Union may not cause the Employer to discriminate against them for violations of the Union's rule.23 Highlighting this is the Board's decision finding an employer and a union to have violated the Act because an employee was discharged for not conforming with a union rule of the character here involved,

^{23.} Radio Officers, supra, n. 21; N.L.R.B. v. Philadelphia Iron Works, 211 F.2d 937 (C.A. 3, 1954), enforcing 103 NLRB 596 (1953); N.L.R.B. v. Local 1423, 238 F.2d 832 (C.A. 5, 1956), enforcing Columbus Show Case, 111 NLRB 206 (1955); N.L.R.B. v. Brotherhood of Painters, 242 F.2d 477 (C.A. 10, 1957), enforcing 114 NLRB 1171 (1955).

one limiting production.²⁴ As employees also, the Charging Parties are free under our statute to refuse to pay the fine, for since it is not a part of "periodic dues," the Union may not cause them to be discharged for such nonpayment,²⁵ or threaten to do so.²⁶ And this is so even if the fine should be upheld by the State Court as a valid obligation owing to the Union. (Supra; n. 26)

But while, as employees, the Charging Parties are free under the Federal statute to disregard every union requirement, except that relating to dues, as members, they are subject to obligations outside of our reach, because our statute does not touch the incidents of that relationship.

In the Gonzalez case, previously cited (n. 15), the Supreme Court saw it that way from the mere terms of the statute. After describing the protection enjoyed by union members as employees under the 8(a)(3) and 8(b)(2) restrictions as previously described, the Court noted (356 U. S. at 320):

But the protection of union members in their rights as members from arbitrary conduct by unions and union officers has not been undertaken by federal law, and indeed the assertion of any such power has been expressly denied. The proviso to § 8(b)(1) of the Act states that [and here the Court quoted the proviso]. (Emphasis supplied.)

Also pertinent on this score is that the lone respect in which the Act contains an internal union regulation is covered by a specific restriction in a separate section—8(b)(5), which limits the initiation fees which may be charged by a union having a union-security contract. This and the financial reporting provisions of Section 9(f) and (g)—since

^{24.} Printz Leather Co., 94 NLRB 1312 (1951).

^{25.} N.L.R.B. v. Electric Auto-Lite Co., 196 F.2d 500 (C.A. 6, 1952).

^{26.} Marlin Rockwell, 114 NLRB 533, 561 (1955).

repealed—were the sole respects in which the House effort to place the internal union-member relation under federal regulation survived the final enactment. And this bears on the intent as manifested in the legislative history, to which we turn.

(5)

The intention not to interfere with the internal affairs of unions is rather formidably manifested in the legislative history on three fronts: (a) the nonsurvival, previously mentioned, of the House effort to place internal union affairs under the regulation of the statute; (b) the express declaration of the sponsors of 8(b)(1)(A) concerning the limits of its intended prohibition; and (c) the explicit disclaimer of its sponsors that it was intended to interfere with internal union affairs. We discuss each of these in terms of the weight given by the Supreme Court to like factors in Curtis Bros.

As to (a), the Supreme Court, in Curtis Bros., gave weight to the fact that the House Bill, unlike the Senate Bill, had a specific provision banning the conduct there involved, and that this failed of ultimate enactment. As stated, the same situation exists in respect to the subject matter at issue here.

The House Bill (HR 3020), in Section 8(c), imposed restrictions on the conduct of unions over members in many respects. These included in subsections (5) and (6), restrictions on the disciplinary powers of fining, expelling or suspending members. LH 180-1.27 In contrast with the

^{27.} The reference "LH" is to the pages of "The Legislative History of the Labor Management Relations Act, 1947" (GPO 1948). Where the designation "CR" appears, it refers to the pages of Volume 93 of the Congressional Record, which report the debate on the measure, in the 80th Congress. All references to the debate will cite the appropriate pages in each of these volumes.

House Bill, the Senate Bill (S. 1126), did not impose any such restrictions, and in its report explaining the limitations placed in 8(a)(3) and 8(b)(2) of its bill upon union-security contracts, previously described, the Senate Committee reaffirmed the freedom of unions in respect to their control over the membership.²⁸ In the final enactment, it was the Senate's view that prevailed, for, as mentioned, none of the House provisions survived the final enactment, with the two minor specific exceptions previously noted.

Aspects (b) and (c) can be discussed together. In Curtis Bros., probably the decisive factor to which the Supreme Court gave weight was the one touched upon earlier—the limits of the intended prohibition of 8(b) (1)-(A), as expressed by its sponsors: In connection with it, the Supreme Court in Curtis, quoted at some length from the sponsors' statements of purpose. From them it concluded, as previously stated, that 8(b) (1) (A) was intended to prohibit "violence intimidation and reprisal or threats thereof," and by that token not to extend to the conduct there involved.

But the statements of the sponsors of 8(b)(1)(A) afford an even stronger basis for a like conclusion with respect to the conduct involved here. In contrast with their silence concerning the conduct involved in *Curtis*, the sponsors of 8(b)(1)(A) were quite explicit about the subject here at issue. They repeatedly emphasized the irrelevance of the membership relation to the kind of co-

^{28.} The Report stated (LII 427):

It is to be observed that unions are free to adopt whatever membership provisions they desire, but they may not rely upon action taken pursuant to those provisions in effecting the discharge of, or other job discrimination against an employee except in the two situations described. [These were ultimately reduced to the single one of tender of dues and initiation fees.] (Emphasis supplied.)

ercion sought to be prohibited by 8(b)(1)(A) and in connection with it, were unequivocal in their assurance that 8(b) (1) (A) was not intended "to interfere with the internal affairs of unions." As previously pointed out, the power of unions to enforce their policies upon members through the control of this gave them over their jobs was effectively curbed by the provisions of 8(a)(3) and 8(b)(2) of the Senate Bill, which drastically limited the grounds on which nonmembership could result in an employee's losing his job under a union-security contract. But the sponsors of 8(b)(1)(A) wanted the employees protected also against coercive tactics other than those which a union can exert through its power over members. These were, as they stated, threats of violence and economic reprisals of the kind unions were known to use upon nonmembers in order to force them to join up. Their object, as they repeatedly put it, was to balance the protection which the Wagner Act gave employees against coercive tactics by employers to force them to abstain from membership, with corresponding protection against coercive tactics by unions to force them to become members. The tenor of the sponsors' statements of purpose was summed up by the Supreme Court in Curtis Bros., as follows:

The note repeatedly sounded is as to the necessity for protecting individual workers from union organizing tactics tinged with violence, duress or reprisal. (Emphasis supplied.)

The opinion in Curtis Bros., refers to and quotes from the "Supplemental Views" to the Committee Report, as filed by five Senators, headed by Senators Taft and Ball. In it they indicated they would introduce 8(b)(1)(A) and stated their purpose to be to protect employees from union tactics, such as "threats of reprisal against the employees in the course of organizing campaigns;20 also direct interference by mass picketing and other violence."

The irrelevance of the power of unions over members to the kind of coercion sought to be outlawed by 8(b)-(1) (A) was again stressed by Senators Ball and Taft on April 25, the day the section was introduced without the proviso, and was repeated by them throughout the week's debate over the measure until its adoption on May 2. In introducing 8(b)(1)(A), Senator Ball explained that its purpose was "to provide that where unions, in their organizational campaigns, indulge in practices [which were an unfair labor practice if engaged in by employers] the unions shall be guilty of unfair labor practices" (LH 1018; CR 4176); and Senator Taft stated that "the men who are coerced may not have anything to do with the union at all. ... Sometimes the union has not even gotten into the plant, when they begin to coerce employees of the plant (LH 1030; CR 4144).

The coercive tactics which they consistently cited as the target of 8(b)(1)(A) were of the kind recited in the "Supplemental Views" previously referred to, and which as they stated there and on the Senate floor, unions were known to use in organizing campaigns. Throughout the week's debate, the instances cited covered the following:

(a) threats to beat up an employee or his family, 30 (b) threat of economic reprisal upon nonmembers through the control over jobs they would achieve after becoming organized and getting a contract, such as causing the employee to be discharged by denying him membership 31 or

^{29.} All emphasis is supplied unless otherwise indicated.

^{30.} Ball: at LH 1018 (CR 4136), LH 1021 (CR 4139); Taft: at LH 1205-6 (CR 4142).

^{31.} Taft: at LH 1025 (CR 4142); LH 1029 (CR 4144); LH 1205-6 (CR 4562); Ball: at LH 1203 (CR 4560).

having him pay a steeper initiation fee in order to keep his job;³² and (c) mass picketing.³³

Added to the sponsor's omission of any allusions to unions internal powers over members in their recital of the kind of coercion sought to be reached by the proposed section were their express declaration that these matters were irrelevant to its purpose and explicit disavowals of any intention to have them interfered with thereunder. By way of background: as previously indicated, the purpose of the bill to leave untouched the control of unions over their memberships had already been pointed out by the Senate Committee in the portion of the Report, explaining the 8(a)(3) and 8(b)(2) strictures on union-security contracts in the bill as it stood (supra, n. 28). But the introduction of 8(b)(1)(A) touched off expressions of apprehensions by various Senators that its language could be construed as interfering with the internal affairs of unions; and in disputing this last, Senator Taft, even before the proviso was introduced, stressed that under the scheme of the bill as a whole, unions were left free in respect to their internal affairs.34

^{32.} Taft at LH 1205-6 (CR 4562).

^{33.} Taft: at LH 1205-6 (CR 4562); Ball: at LH 1203.

^{34.} On April 25 in the specific context of discussion of 8(b)(1)(A), he stated (LH 1030; CR 4144):

Even in this bill we do not tell the unions how they shall vote or how they shall conduct their affairs...

He repeated it on April 29, this time in the context of a discussion of the strictures of 8(a)(3) and 8(b)(2) on union-security contracts (LH 1097; CR 4318)

The pending measure does not propose any limitation with respect to the internal affairs of unions. They still will be able to fire any members they wish to fire, and they still will be able to try any of their members. All that they will not be able to do, after the enactment of this bill is this: If they fire a member for some reason other than nonpayment of dues they cannot make his employer discharge him from his job and throw him out of work. That is the only result of the provision under discussion.

After the proviso was introduced, Senator Ball twice expressed his approval of it as confirming the intention of the sponsors of 8(b)(1)(A) all along not to have it touch any aspects of the union-member relationship. Upon introduction of the proviso by Senator Holland on April 30, Senator Ball stated (LH 1141; CR 4400):

Mr. President . . ., I merely wish to state to the Senate that the amendment offered by the Senator from Florida is perfectly agreeable to me. It was never the intention of the sponsor's of the amendment to interfere with the internal affairs of organization of unions. The amendment of the Senator from Florida makes that perfectly clear.

And, on May 2, the day of the vote on the measure, Senator Ball repeated that disclaimer at the conclusion of his exposition of the type of union tactics sought to be reached. He said (LH 1200; CR 4559):

That modification [the proviso] is designed to make it clear that we are not trying to interfere with the internal affairs of a union which is already organized. All we are trying to cover is the coercive and restraining acts of the union in its effort to organize unorganized employees.

With the scope of the contemplated prohibition of 8(b)(1)(A) as thus explained by the sponsors, it would seem clear, as was the case with the conduct involved in Curtis Bros., that 8(b)(1)(A) had not been intended to reach the conduct here involved, even without the proviso. This is not because an internal union discipline is not coercive, for that is the purpose of all disciplines, but because, as its sponsors indicated, it was not the kind of coercion with which 8(b)(1)(A) was concerned. With the prohibiting clause so understood, the Charging Parties' contention that the proviso is not a limitation on 8(b)(1)-(A) would be correct only in the sense that a nonexistent

prohibition needs no proviso to limit it. But if, contrary to the intention of its own sponsors, 8(b)(1)(A) were to be interpreted to have the broader reach contended for here, then the proviso is a limitation upon it, for a proviso is by its very nature a limitation upon the prohibition to which it is attached. And it would seem rather clear that the proviso, explained by Senator Ball as confirming the intention not to interfere with the "internal affairs of unions" is a generic expression intended to immunize the prescription of union rules upon members and the use of internal discipline in enforcing them, without regard to the content of the rule and without regard to whether the discipline be fines, suspension or expulsion.

Of course, the coercive tactics which unions are forbidden under 8(b) (1) (A) to use in order to force employees to become members they are also forbidden to use in order to force employees to fall into line with a given union policy, whether upon members or nonmembers. Just as they may not coerce employees into membership by threats of violence, or economic reprisal affecting their tenure, or mass picketing, so may they also not use these measures to force employees to follow a union rule or policy. Board lore is replete with instances in which unions have been found guilty of violating 8(b) (1) (A) for resorting to enforcing measures which stepped out of the confines of internal disciplines and into the forbidden area as marked out by its sponsors.

^{35.} Accenting this demarcation is the pair of cases exemplifying a union's immunity under 8(b)(1)(A) in merely demanding of an employee payment of membership obligations in excess of dues and initiation fees as limited by 8(a)(3) and 8(b)(2), without threatening discharge (National Lead, 106 NLRB 545), and its liability thereunder in threatening to cause the discharge of the employee for not paying the excess, even though adjudged in a State court as validly owing the Union under its bylaws. Marlin Rockwell, 114 NLRB 53.

The forbidden coercive conduct is the use of enforcement measures which go beyond the unions' power over members as members. It does not lie in the fact that the rule or policy sought to be enforced purports to restrict members' conduct in their role as employees, in the form of rules against strikebreaking or work rules. That kind of rule or policy is the implicit premise of the very existence of a labor organization. The collective withholding of their labors is the resource which employees bring to the negotiating table to match the bargaining power of the employer. The group may not demand of the individual that he join them in this collective activity as a condition of his remaining an employee; but the Act leaves untouched the group's requiring that he do so as a condition of his remaining one of their members, and if as part of the compact, he has submitted to certain internal disciplines in effectuation of this requirement, that too is left untouched by the Act, and is a subject of the contract law of the State.

So it is not the rule but the method of enforcing it that controls. The rule expresses an end, not a means, and as the Board put it in an early case cited by the Supreme Court in Curtis Bros. to exemplify the correct interpretation—"in that section [8(b)(1)(A)], Congress was aiming at means, not ends." Perry Norvell, 80 NLRB 225, 238-9 (1948).

Proponents have pointed to nothing in the legislative history which supports their position that the coercion can inhere in the rule which is sought to be enforced as opposed only to the method of enforcing it or any other requirement of a union. They have cited an extract from a long statement by Senator Taft, at the conclusion of the debate over the measure, in which he recapitulated the coercive organizational measures sought to be outlawed

by 8(b)(1)(A). The extract as quoted and as isolated from its context, reads (LH 1206; CR 4562):

The effect of the pending amendment is that the Board may call the union before them, exactly as it has called the employer, and say, "Here are the rules of the game. You must cease and desist from coercing and restraining the employees who want to work from going to work and earning the money which they are entitled to earn." The Board may say, "You can persuade them; you can put up signs, you can conduct any form of propaganda you want in order to persuade them, but you cannot, by threat of force or threat of economic reprisal prevent them from exercising their right to work."

Omitted by proponents is the portion of the statement immediately preceding the extract, which gives it its meaning. Senator Taft, at the request of Senator Saltonstall, had been citing the kind of coercion sought to be outlawed by 8(b)(1)(A). He mentioned the tactics previously summarized, and the quoted extract came after he mentioned the tactic of mass picketing, his point being that when a union resorts to that kind of tactic, "the effect of the amendment" is the one set forth in the quoted extract. The Senator's immediately preceding description of that tactic shows that that was what the "right to work" expression had reference to, thus (LH 1205; CR 4562):

Let us take the case of mass picketing, which absolutely prevents all the office force from going into the office of a plant. That would be a restraint and coercion against those employees, an interference with their rights to work. . .

... In some small plant in which the labor (sic) is not organized, a man comes and says, "I represent the employees. ..." In any event, they do not reach an agreement, and the man immediately calls a strike, he pickets the plant, he keeps out the employees.

When the employer goes to the Board, the Board says, "... We have nothing to do with that under the Act."

The effect of the pending amendment is that the Board may call the union before them (etc.).

The suggestion of the proponents that although expulsion may be a permissible form of discipline under the proviso, a fine is not, is inherently contradictory. The same literal construction which would exclude a fine from the proviso because Webster's does not include a fine in its definition of "rules with respect to the acquisition or retention of membership" would have to exclude expulsion as well, because it is not embraced within the literal scope of the term "prescribe." If the right to "prescribe" implicitly embraces the right to enforce, as it does, then there can be no valid distinction based on the kind of internal enforcement measure used. The portions of the House Bill purporting to regulate unions' disciplinary powers indicate that Congress was well aware, as Professor Clyde Summers has put it in his study of long-existing trade union practices in that field, 35a that "the three common types of penalties for offenses are fines, suspension for a limited period, and expulsion," and "the most common form of penalty is a fine." Indeed, long before the enactment of Taft-Hartley, the Federal judiciary had recognized the disciplines of "fine, suspension, or expulsion for an infraction of union rules" as valid aspects of a "purely voluntary" relation of "membership in the union."36

Highlighting the anomaly here of any contention that Congress took a more baleful view of a fine than it did

³⁵a. Summers, Disciplinary Powers of Unions, 4 Ind. & Lab. Rel. Rev. 15, 26 (1950).

^{36.} Barker Painting Co. v. Bro. of Painters, 23 F.2d 742 (C.A. D.C., 1927).

of expulsion, is that the nonsurviving provisions of the House Bill paced more stringent restrictions on the substantive grounds for the penalty of expulsion than that of a fine. The only restrictions on the substantive grounds for a fine were those set forth in 8(c)(5) of the Bill forbidding its use as a penalty for member's exercising basic civil rights, such as freedom of speech, assembly, and exercise of the voting privilege, of the kind embodied in the "Bill of Rights" portions of the LMRDA, enacted by Congress 12 years later (supra, n. 18). The restrictions on the substantive grounds for expulsion, under 8(c)(6) of the House Bill were considerably greater. But neither of these provisions made it impermissible for a union to discipline a member for infraction of a work rule of the kind involved here or in Minneapolis Star. To accept the proponents' interpretation of 8(b)(1)(A) is thus to conclude that despite the express disavówals by its Senate sponsors of any intention to interfere with the internal affairs of unions, and despite their counsels having prevailed over that of the House so as to strike down all provisions contrary to such disavowals, the result of the ultimate enactment was to impose more stringent restrictions on union disciplines than even those embraced in the rejected House measure.

Further significantly bearing upon the subject is the action taken by Congress after the enactment of the Taft-Hartley Law. This has two relevant aspects: first is its action, under Title I, the "Bill of Rights" portion of the LMRDA of 1959, in enacting for the first time some Federal protections for the rights of union members as members; second was its action, in the course of amending our Act under Title VI of the same law, in leaving untouched the interpretation of the proviso under the controlling doctrine which is here challenged.

Concerning the first: as stated before, no one had disputed the correctness of the Board's consistent interpretation, upheld by the Seventh Circuit in ANPA; supra n. 6, and reaffirmed by the Supreme Court in Gonzalez, that the Act gave no protection to members against union conduct as members. As two noted commentators put it, "the statute protects employment rather than union membership."37 Because of this and the inadequacies of the protection given by some States to union members as members, there was strong agitation that Congress enact protections for members against arbitrary exercise of union power. The abuses were not thought to inhere in the substantive grounds for discipline exemplified by the kind of rule involved here, or in Minneapolis Star, or even ITU. They concerned the use of disciplinary powers to penalize the members for exercising the rights of free speech and assembly, of the kind ultimately protected in the Bill of Rights portion of LMRDA, and the absence of procedural safeguards in imposing any discipline, as ultimately guaranteed in the same measure.38 Yet Congress hesitated to even go that far until its reluctance "to reenter such a hazardous political mine field"39 was overcome by the "much publicized exposés of the McClellan Committee":40 and, as observed by the incumbent General

^{37.} Aaron & Komaroff, Statutory Legislation of Internal Union Affairs, 44 Ill. L. R. 425, 446-7 (1951), Sugerman, The Right of the Individual Employee under the Taft-Hartley Act, NYU 3rd Conf. on Lab., 357-8 (1950).

^{38.} Aaron & Komaroff, ep. cit., supra, n. 37; Summers, Legal Limitations on Union Discipline, 64 Harv. L. R. 1049, 1050 (1951). Summers, The Role of Legislation in Internal Union Affairs, 10 Lab. L. J. 155-8 (1959); Aaron, The Labor Management Reporting & Disclosure Act of 1959, 73 Harv. L. R. 851-2 (1960).

^{39.} Note: Rights of Union Members: The Developing Law under the LMRDA, 48 Va. L. R. 78, 79 (1962).

^{40.} Ibid. Holcombe, Federal Government & Union Democracy, NYU 13th Ann. Conf. on Lab. 247, 248 (1960). Rothman, Legislative History of the "Bill of Rights" for Union Members, 45 Minn. L. R. 199 (1960). Cox, Law & the National Labor Policy (1960) 87.

Counsel in an informative article on the legislative history of the "Bill of Rights" portion of the LMRDA, "without the investigations [by the McClellan Committee] it seems extremely doubtful that there could have been compelling pressure in Congress for any type of legislation relating to internal union affairs."41 Yet even that initial Federal venture into the internal union relationship did not penetrate it with the depth here claimed for 8(b)(1)(A); it enacted due process protections for any member before he "may be fined, suspended or expelled" (§ 101(a)(5)), (emphasis supplied); and forbade the use of these disciplines to penalize members for exercising the rights of "freedom of speech and assembly" (§ 101(a)(2)). And the remedy given for these rights was not by recourse to the Board, but by private suit in the district courts (§ 102). As the Supreme Court stated in Curtis Bros., the later action of Congress in specifically legislating upon the type of subject here at issue is relevant in the consideration of a contention which seeks "to extend the reach of the earlier Act's vague language to the limit, which, read literally, the words might permit."

Of even more decisive significance under traditional canons of interpretation, is the second phase of Congress' action in 1959—that dealing with the amendments to our Act embodied in Title VI of the LMRDA. The purpose of these amendments, as frequently stated on the floors of both Houses and in the reports on the legislation, was to plug up "loopholes" in the Taft-Hartley Law, some being thought to result from disputed interpretations of various of its provisions by the Board and the Courts. Although the investigation preceding the enactment of LMRDA went deeply into the union-member relationship, no one, as stated, questioned the interpretation of the proviso, as em-

^{41.} Rothman, op. cit., supra, n. 40, at 204.

bodied in the Board's and the Seventh Circuit's decisions in the ITU and ANPA cases (supra, n. 6) and the Board's decision in Minneapolis Star (supra, n. 7). Nor did Congress. While plugging up "loopholes" in other respects, it did not change the interpretation thus authoritatively given to the proviso, that under it, a union did not violate 8(b)(1)(A) by using its internal disciplinary powers to enforce a rule governing how or when a member may work, whether by expulsion, as in ITU, or fine, as in Minneapolis Star. Under well-established doctrine, "it is a fair assumption that by [leaving] without pertinent modification the provision with which we here deal, Congress accepted the construction placed thereon by the Board and approved by the Courts." N.L.R.B. v. Gullet Gin Co., 340 U.S. 361, 366 (1951).

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We come to Allen Bradley. That case, decided by the Seventh Circuit in 1961, involved, as previously stated, not the issue of whether a union had engaged in an unfair labor practice, but whether an employer had done so. The employer had refused to sign any contract with the Union, unless it included an agreement not to fine any member for refusing to participate in a strike. In its own decision the Board, on the ground that the Union's fining power was a part of its internal affairs within the immunity of the 8(b) (1) (A) proviso, held that by insisting upon the clause in question the employer had defaulted in its bargaining obligation under Section 8(a) (5), under the doctrine laid down by the Supreme Court in Borg Warner. 43

^{42.} Allen Bradley Co., 127 NLRB 44 (1960).

^{43.} N.L.R.B. v. Wooster Div. of Borg Warner, 356 U.S. 342 (1958). There an employer had been held to have unlawfully refused to bargain in insisting on an agreement by the union not to strike except upon authorization by the membership at a meeting duly called for that purpose.

The court in Allen Bradley thought the Board's conclusion did not follow from its premise: it deemed Borg Warner not to be controlling, because granting the union's fining power to be immune under the proviso, the employer had an interest in the subject, which it could seek to protect by the clause it proposed, the court seeing it as the equivalent of a no-strike proposal, which would have been concededly proper. That, as the court observed, was all it . needed to decide. It said:

This case might well be disposed of on the basis of what we have said.

But although it had this disposed of the issue before it. it nevertheless went on to address itself to the Board's premise in the manner which accounts for this proceeding. It said:

However, the Board strenuously insists that the Company proposal was not a subject for bargaining because the Union in its coercive activities was protected under the proviso in Sec. 8(b)(1)(A), which authorizes the Union to prescribe its own rules "with respect to the acquisition or retention of membership therein." True, the fines which the Union had previously imposed and about which the Company was concerned were authorized by Union rule. Even so, there is nothing in the situation before us which indicates that such fines bore any relation to the "acquisition or retention of membership." The Board evidently recognizes this because it argues, "imposition of the fine is merely a step in determining membership status; non-payment leads to expulsion." We assume that a union had broad powers in prescribing rules relative to the acquisition and retention of its members. However, that power, in our view, is not absolute. It goes beyond any permissible limit when it imposes a sanction upon a member because of his exercise of a right guaranteed. by the Act. Coercive action, whether by way of fine, discharge or otherwise, which deprives a member of

his right to work and his employer of the benefit of his services, cannot be said to relate only to the internal affairs of the union. (Emphasis added.)

The component elements of the foregoing statement have already been treated in our discussion of the proponents' argument, which adopts them. Thus, as we have seen, the discipline of a fine is no less a part of a union's internal affairs than that of expulsion; and, as earlier mentioned, the same court, 10 years earlier in ANPA (supra, n. 6), had held the discipline of expulsion to be immune on the premise that "the proviso in § 8(b)(1)(A) permits unions to enforce their internal policies upon their membership as they see fit."

The statement that a union "goes beyond any permissible limit when it imposes a sanction upon a member because of his exercise of a right guaranteed by the Act" overlooks the distinction, stressed by the Supreme Court in the Gonzalez case (supra, n. 15), between a member's rights as an employee, which the Act protects, and his rights as a member, which it does not. Under that distinction, what controls is not the nature of the rule for which the sanction is imposed, but the nature of the sanction. If the sanction reaches into the member's status as employee, as a discharge would do, the Union, for reasons already explicated, has stepped outside the immunized preserve of internal affairs and is liable under the Act; on the other hand, if the sanction is limited to the exercise of the unices disciplinary powers, whether in the form of expulsion, suspension, or fine, it has stayed within it, and is immune under the 8(b)(1)(A) proviso.

Also, as previously pointed out, if a sanction were to be held to lose its immunity as an internal affair because of the substantive requirement of the rule which it enforces. a different result would have had to be reached by the

Court in ANPA, for there the threatened expulsion was "a sanction upon a member because of his exercise of a right guaranteed by the Act" and in enforcement of a rule affecting the members "right to work" in a much more drastic manner. In contrast with Allen Bradley, where the discipline enforced a rule requiring observance of an ordinary, economic strike, the one in ANPA enforced a requirement upon members to abet the union in strikes for closed shop conditions, for engaging in which the Board held the union itself to have violated § 8(b)(2) of the Act.

One would hardly understand that the Allen Bradley dictum was intended to overrule the holding in ANPA, since if that had been the intention, the dictum would presumably have said so and mentioned ANPA. The holding in ANPA being thus still controlling, the premise on which the court there held the sanction of expulsion to be immune under the proviso would, were the matter squarely presented for decision, call for the same result in respect to a fine. More particularly so in that for the interpretation it gave the proviso in ANPA, the court expressly relied on the legislative history, while the dictum in Allen Bradley makes no such claim. Lending added support to this conclusion is the previously mentioned presumption that Congress approved the interpretation given the proviso in the ANPA and Minneapolis Star cases by leaving that interpretation untouched at the same time that it acted to plug up "loopholes" in the Act under the amendments thereto enacted in 1959.

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The court's statement that a union's "power [in respect to its own rules] is not absolute" touches upon a previously discussed matter, but in a slightly varying posture. Congress, to the extent already described, has specifically charted out the restrictions it has seen fit to impose upon the power under Federal law. All else remains outside the Federal domain, and subject to State policy, as these matters are until Congress acts to bring them within the Federal purview.⁴⁵

The point above may well have been blurred in Allen Bradley by the background of State court litigation described by the Seventh Circuit in its opinion, which explains the reference in its dictum to "the fines which the union had previously imposed." As recited in the opinion, during an earlier strike against the employer in question, the union had assessed fines upon members for disregarding the rule against strikebreaking and sued in the Wisconsin courts to collect them. The penalized members then filed charges with the Regional Office of the Board accusing the union of violating Section 8(b) (1) (A), and the General Counsel in Opinion F-198, dated October 28, 1957, refused to issue a complaint on the ground that the conduct of the union was immune under the proviso of 8(b)(1) (A). They then filed charges with the Wisconsin Employment Relations Board (WERB) charging the union with unfair labor practices under a provision of the Wisconsin Employment Peace Act (Ch. 111 Wis. Stats.) comparable to our 8(b) (1) (A) without the proviso. The story from then on is recited in the decisions of the Wisconsin Supreme Court in Wisconsin Board v. Lodge 78 IAM, 46 LRRM 3062 and the companion case of Local 248 UAW v. Wisconsin Board, 46 LRRM 3058, both decided October 4, 1960.

The WERB found that the union's action in assessing and threatening to assess fines on members for crossing picket lines coerced them under a provision of the Wisconsin Employment Peace Act comparable, as previously

^{45.} Allen Bradley Local 1111 v. WERB, 315 U.S. 740 (1942); U. A. W. v. WERB, 336 U.S. 454 (1949).

stated, to our 8(b) (1) (A) minus the proviso, and issued a cease and desist order. After affirmance of the order by a lower Wisconsin court, the matter came up on appeal to its Supreme Court. That Court, although expressly reaffirming its earlier holding in Woychik (supra, n. 14) that fines imposed by a union for violation of a rule against strikebreaking are validly collectible as debts under the "contract of membership," reversed its lower court and the WERB—but not on the merits. It did so only on the ground of Federal preemption.

The Supreme Court of Wisconsin based its conclusion of Federal preemption on an interpretation of the Board's decisions in ITU, Minneapolis Star, and also in Allen Bradley (before the Seventh Circuit's review) as more than a holding that a union's disciplinary powers in enforcement of a rule against strikebreaking were merely immune under the proviso of 8(b)(1)(A): the court viewed them as declarations by the Board that the disciplinary union action in those cases was affirmatively "protected" thereunder, and hence had the effect excluding the State from any jurisdiction in respect to them. It expressed the opinion that the construction it was thus attributing to the Board's decisions was "certainly a permissible one" because of the "intimate connection," as the court saw it, between the power of a union "to enforce solidarity among its members [during a strike]" and its being an "effective instrument of collective bargaining," as protected by Section 7 of the National Act. Hence, the Wisconsin Court concluded that the field was federally preempted under the Supreme Court's doctrine in the Garmon case.46 to the effect that there is Federal preemption even where the activity is "arguably within the compass of sec. 7 or 8 of the [National] Act."

^{46.} San Diego Council v. Garmon, 359 U.S. 236 (1959).

The manner in which the Board's decision in Allen Bradley influenced the State court toward that conclusion, highlights still another distinction between Allen Bradley and a case such as this, or ITU and Minneapolis Star. Here, as in ITU and Minneapolis Star, the issue of whether a union has violated 8(b)(1)(A) is squarely presented. In contrast with these, in Allen Bradley, the Board merely considered the matter in connection with whether an employer had violated its bargaining obligation by insisting upon a clause which purported to give it control over unions' internal disciplinary powers. This aspect of Allen Bradley led the Wisconsin court to misinterpret the intent of the Board's decisions in ITU and Minneapolis Star, and, it would appear, led both it and the Seventh Circuit to believe that the Board, in Allen Bradley at least, had equated immunity under the 8(b) (1) (A) proviso with affirmative protection. The aspect of the Board's action which tended to create that impression was its holding to the effect that the clause proffered by the employer in Allen Bradley was offensive on the same ground as the one in Borg Warner. But in Borg Warner (supra, n. 43) the offending clause purported to control the manner in which a union could call a strike. This last encroached upon a field excluded from employer invasion under the rights which union members enjoyed as employees under the protections of Section 7. Insofar as the Board found the clause in Allen Bradley offensive on the same basis as in Borg Warner, it conveyed the impression, however, unwittingly, that it deemed the immunity under the 8(b)-(1)(A) proviso to be equivalent to an affirmative protection. The Wisconsin court so stated. It first quoted the portion of the Board's opinion in Allen Bradley, which, after stressing the immunity given unions' disciplinary powers under the 8(b) (1) (A) proviso, the Board said:

By thus intruding on rights, guaranteed to Unions by the Act, Respondent's proposed clauses fell outside the scope of mandatory bargaining. (Emphasis the Court's.)

The Wisconsin court then concluded:

The foregoing quotations from decisions of the National Labor Relations Board make it abundantly clear that such Board interprets the proviso as having the effect of making the enforcement by a union of its own constitution and bylaws a protected activity under the Labor Management Relation Act.

The Seventh Circuit would appear similarly have construed the Board's position, since, as can be observed in the opening sentence of the Allen Bradley dictum, it introduced the discussion as one dealing with a contention that the union's activity was "protected by the proviso of Sec. 8(b)(1)(A)."

Of course, the Board never intended by its decisions in ITU and Minneapolis Star to suggest that the disciplinary action in enforcement of the rules there involved were affirmatively protected under the Act, as opposed to merely being not violations thereof. Whatever basis the Wisconsin Court had for any such impression because of the presumably protected character of the strikes in Minneapolis Star and Allen Bradley, in aid of which the fines were imposed, it is difficult to see how the immunity ascribed under the 8(b)(1)(A) proviso to the discipline invoked by the union in ITU could be construed as a declaration that such activity had the affirmative protection of the very statute they were intended to help flout, and which the Board held to have in fact been flouted by the strike activity itself.

The ITU decision could not have been more clearly calculated to exemplify the intention of Congress, under the proviso, to chart out an area not of affirmative protec-

tion, but, as the Supreme Court described it in Gonzalez, one over which Congress "expressly denied" the assertion of power. This left a Federally unentered enclave, "neither forbidden by the Federal statute, nor . . . legalized and approved thereby" (UAW v. WERB, supra, n. 45, at 265), and, hence subject to State regulation, since "Congress has not made such . . . union conduct . . . subject to regulation by the Federal Board." Allen Bradley Local 1111 v. . WERB, supra, n. 45, at 749.

The intention of Congress to stay out of that field is too manifest, it would seem to me, to permit of an "arguable" interpretation of the 8(b)(1)(A) proviso as defining an area of protection rather than one of Federal abstention. Any other contention I would suggest, misconceived the manifest purpose of the 1947 statute. Its purpose was not to enact more protections for labor unions but for the first time in our industrial history, to subject their activities to Federal restriction. The proviso was not the outcome of any effort to declare an affirmative protection but to make "perfectly clear," in Senator Ball's words, the intended limits of a proposed restriction on union conduct. The limits, as conceived by the managers of the Senate Bill, whose counsel prevailed over the House, were embraced in the sharp line of demarcation between the rights of members as employees and those as members, i.e., between union's conduct outside its membership confines, which the Act undertook to regulate, and those within it, which Congress chose to stay out of. This sharp line was drawn from the very outset in the Committee Report on the Bill explaining the restriction upon enforceability of union security contracts, previously quoted (supra, n. 28). The same purpose, as also previously indicated, was confirmed by the assurances of the sponsors of 8(b)(1)(A) concerning its intended limits without the proviso, and their agreement to the proviso as confirming those limits. The Senators, in

response to whose apprehensions concerning the reach of 8(b)(1)(A) the sponsors gave these assurances, did not base their concern over 8(b)(1)(A) on the possible impairment of any preexisting Federal protection of unions' disciplinary powers. There is no indication that it occurred to anyone that such protection existed. They were concerned about its having the effect of outlawing conduct which was assumed never to have been reached by the Federal statute and which they feared might be interpreted as being placed under Federal regulation by 8(b)(1)(A). The assurances of the sponsors to the contrary were based on the intent of the Bill as a whole not to reach into unions' internal disciplinary powers and of the intent of 8(b)(1)(A) to bar coercive tactics to which such powers were irrelevant, a matter which the proviso was intended to make "perfectly clear." And, as stated, the Congressional intention not to enter the union-member relationship under our Act is manifested further by the fact, that its later limited entry into that field under the Bill of Rights of 1959 was accomplished by legislation specifically directed toward that end, specifically stating its scope, and specifically naming the authority (other than the Board) empowered to police the protections thus enacted.

It would seem clear therefore, that those aspects of the union-member relation which had not been specifically placed within the Federal purview remained, as they always had been, subject to State law or policy.47

The Wisconsin Court saw in its State board's interpretation of the Wisconsin Act the kind of encroachment upon

^{47.} See Cox, The Role of Law in Preserving Union Democracy, appearing as a chapter in Harrington & Jacobs, Labor in a Free Society (U. of Cal. 1959), pp. 54-55; Note: Trade Unions Members Rights in connection with Disciplinary Proceedings, 33 Minn. L. R. 156, 162 (1959).

a union's traditional disciplinary powers which would impede its capacity to perform a function of the very kind which the preamble of the Federal Act approvingly envisaged for unions. It is inconceivable, however, that the proviso had any purpose of shielding that power against State encroachment, envisioned by either the sponsors of 8(b)(1)(A) or the sponsors of the proviso. The latter manifestly sought to leave unions' disciplinary powers exactly where they had been assumed to be all along-subject to State authority, where the body of law as developed in that area was one which, shall we say, unions found it not too hard to live with.48 At any rate, they could hardly have felt the need for Federal "protection" against a body of State law, under which, as Professor Summers describes' it, "in upholding discipline for violation of [union work] rules, the courts imply that the rules are within the permissible limits of union power" (supra, n. 48, op. cit. at 1064). The sponsors of the proviso acted to obviate the peril, as they voiced it, to that kind of freedom which they apprehended in 8(b) (1) (A) as it stood without the proviso. and the sponsors of 8(b)(1)(A), in approving the proviso, indicated that it merely confirmed their intention from the start not to make any Federal inroads upon it-but hardly to give it Federal protection either.

The various factors alluded to by the Wisconsin Court in discussing the effects of its board's decision upon a union's capacity to perform its traditional function as a labor organization are indeed germane to the second issue before it and which it held it did not reach—namely, whether the State board had correctly interpreted the Wisconsin statute under a provision comparable to our

^{48.} Note: Trade Unions' Members Right in connection with disciplinary Proceedings, 33 Minn. L. R. 156 (1959). Summers, Legal Limitations Union Discipline, 64 Harv. L. Rev. 1049 (1951).

8(b) (1) (A) minus the proviso, in the light of State policy, embodied in such decisions as Woychick (supra, n. 14), which holds a fine assessed on a member in enforcement of a rule against strikebreaking to be a valid debt under the "contract of membership." And insofar as the Wisconsin Court deems the policy of another jurisdiction affected in someway by the result, whether it be that of the Federal jurisdiction or of a sister State, that would be germane to its own determination of whether to apply its contract law in comity with the affected policy of the other jurisdiction. However, this involves not preemption but comity—the accommodation which the courts of a given jurisdiction, in applying their own law, see fit to make to the interest or policy of another jurisdiction, thereby affected.

By way of example, we may assume that in passing upon the validity of the substantive ground, under State - policy, for a given union discipline, a court could well take a different view of the kind of rule involved in ITU, from that in Minneapolis Star or Allen Bradley. And to cite a most extreme example for the purpose only of illustrating the point, we may assume that a State court would take one view of a rule forbidding a member to try to bribe a Federal official and another of one requiring him to do so. And in striking the latter rule down, the State court could hardly be accused of encroaching upon the Federal domain: · sit would in such an instance, be applying its own law with due regard for the manner in which the policy of another jurisdiction is affected by the rule in question and the inherent offensiveness of the rule. Like factors would enter into its consideration of a union rule dealing with equivalent activity on the part of any member toward an official of a sister State.

^{49.} See 11 American Jurisprudence (1937), "Conflict of Laws", §§ 116 et seq., at pp. 397 et seq.

In sum, nothing in the proviso of 8(b)(1)(A) is intended to extend to a union's disciplines, which have been immunized thereunder, the protection which the Act accords to the activity which the measure in question is designed to promote such as a protected strike, as Minneapolis Star; and in like vein, nothing in it is intended to attach to the discipline the illegality of the activity thereby intended to be abetted, such as an illegal strike, as in ITU. The sole test of the immunity is not what the discipline is for, but what it is. If the discipline is internal union discipline, the immunity is complete, regardless of what it is for. If it is external and reaches out to the members' tenure as imployee or to his person, the immunity is lost, again without regard to what it is for. And in granting that immunity, Congress intended to and did chart out an area neither protected by Federal statute nor embraced within its prohibitions. By that token, that area remains subject to State law, until such time as Congress specifically acts to place it or any part thereof under Federal regulation. And, by way of final observation in any event: . whetheror not the Wisconsin Court was right in viewing these disciplines as affirmatively protected by the Federal statute, one can hardly challenge the correctness of its underlying assumption, expressly stated in its opinion that at the very least they were not illegal under a statute, which in that court's view went so far as even to lend itself to "certainly a permissible" interpretation of being protected

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reasons stated, I find it is not.

thereunder. At any rate, whether the discipline here involved is so illegal is the only issue before us, and for the

This concludes the case insofar as it involves the issue raised by both proponent in common—i.e., insofar as they have requested a reexamination, which has here been made, of the doctrine of Minneapolis Star, in the light of the Allen Bradley dictum. The conclusion that the immunity of the proviso, in the light of its manifest intent, applies to all internally exerted sanctions, whether in the form of fines, suspension, or expulsion, without regard to the content of the rule thereby enforced, disposes of the basis on which counsel for the Charging Parties, at least, has urged a result different from that reached in Minneapolis Star.

Government counsel go farther. Their position proposes a broader concept of our policing power over union rules than anything suggested in the Allen Bradley dictum -one which would mean rejecting not only Minneapolis' Star, but ITU as well, and even then on a more expanded basis. Under their concept, the discipline would fail of immunity unless in enforcement of a rule, which is "reasonable." The proposition, as stated, is that "a union rule, even if related to the 'acquisition' or 'retention' of membership, must be 'reasonable' to be sanctioned;" and they urge that this test would be no innovation, but one already "indicated" by two court cases of pre-Allen Bradley vintage. Perhaps the cases thus cited had best be left with the observation that they do not so indicate. I have in fact, included them among the cases cited in footnote 23, supra, as illustrative of a forbidden method of enforcing a rulethat of discharge.50

^{50.} They are Brotherhood of Painters, and Local 1423 Carpenters. The court, in each instance, preceded the condemnation of the discharge there resorted in enforcement of a union's job rotation rule with the expression "although the union may prescribe reasonable rules for membership and its retention."

build their proposition. No such issue was before the court and there is no explanation of the term. In total context, it would seem manifest the court was assuming the reasonableness of the rule to refute the union's attempted reverse application of the proposition advocated by Government counsel here—a

But in point here are the implications of that test in the light of counsel's proposed application of it. Counsel urge that the rule here involved fails to meet their proposed standard in that "Respondent has not shown it has that legitimate interest in the area of production ceiling which would balance the restraint and coercion it has inflicted on members."

• This cuts a wide swath. First of all, the record, as appears in the factual recital, rather plainly indicates that the ceiling rule, as administered at the Employer's establishment, apart from serving as a yardstick in management's

contention that the reasonableness of the rule would justify the measure used to enforce it.

Apart from the above, Government counsel' urge that the Board had already turned its back on the Minneapolis Star doctrine in two subsequent cases. But since these cases preceded the Board's decision in Allen Bradley, where the Board's reaffirmation of the doctrine is the subject of the very court dictum on which this whole case turns, the doctrine would seem to have had a rapid return to grace. Needless to say, the cases cited do not support counsel's view. The first case, Local 1400 (Pardee Constr.), 115 NLRB 126 (1958), involved coercion not upon members, but on nonmembers in the form of money exaction for a needed work card in the area, which members were not required to pay. The other, Columbus Show Case, 111 NLRB 206 (1955), was an 8(b)(2) discharge of employees for getting jobs without observing the union's job rotation rule. The Board's 8(b)(2) order in that case was enforced by the court in Local 1423, one of the two court cases mentioned at the start of this footnote. The Trial Examiner there had also found the union to have violated 8(b)(1)(A) in threatening the employees with such discharge and with a fine if they did not observe the rule, and the Board dismissed the finding because the complaint alleged no independent 8(b)(1)(A) violations. Counsel construe the Board's procedural dismissal of the finding as tacit approval of its content. On that theory, the refusal of a tribunal to pass upon an issue because not procedurally before it achieves stature as a decision on the merits-either way, depending on who is making the claim.

passing on grievances concerned with job allowances, plays an important role in negotiations concerned with setting the minimum hourly rate, and is also the standard employed in management's "factoring" the hourly rate raises into the piece rate. Thus, in terms of a union's traditional function of trying to serve the economic interests of the group as a whole, the Union has a very real, immediate and direct interest in it.

As to the qualifying adjective, "legitimate," I would presume it is not used in the sense of "legal," since concededly Congress has not outlawed the practice of production ceilings, as, in a very limited way, it did, under Section 8 (b) (6), in respect to featherbedding. If the term is intended to connote a reasonable relation to a Union's traditional economic objective, the authorities on the subject, in treatises from which pertinent extracts have been reproduced in Appendix B of this report, inform us that the setting of production limits among pieceworkers is hardly new in our industrial life, and that it has its roots in experience under piecework and incentive plans giving rise to apprehensions, reasonably grounded, with which such a practice is designed to cope. The practice may or may not be based on theories which all economists would endorse as having current validity, but I wonder whether that is our concern, rather than that of the legislature. And that brings us to the conception of our power, which is embraced in Government counsel's peroration, as follows:

There is another great issue in this case. The waste of machinery and men which results from Respondent's rule prohibiting members from working is staggering. The amount of employee idleness resulting from the ceiling is not something the men themselves can endure, let alone the nation or the Company. Certainly the Board is empowered to act against union arbitrariness' which can lead to disaster

for employees, companies, and a whole economy. The unfavorable effect of a rule limiting production and preventing employees from exercising their right to work does not stop with an individual employee, although that would be sufficient to find a violation in this case. It spreads to whole blocs of employees, to industries, and to our nation itself. The adverse economic consequences of Respondent's rule are enormous." The Board is not powerless to prevent them.

Apart from whether the above can be said to embody a balanced appraisal of the record, I must confess to an inability to fathom the basis for the assumption that if the aversion above expressed should rub off on me or the Board, it would acquire the stature of law. I had not thought that "certainly the Board is empowered to act against" union or employer practices on the strength of its particular views concerning their economic desirability, or that any agency ever was so empowered, if it constitutionally could be I had always supposed that the governmental body vested with the function of appraising and acting upon such a matter was Congress. There, if I may suggest, is the proper forum for counsel's expert.

The subject of the expert's proffered testimony, as I indicated at the hearing in excluding it, is germane to a legislative inquiry concerned with recommendations for future legislation, not to an adjudicative hearing concerned with whether an existing law has been violated.

The acknowledged authority on the general subject has put it in a manner which applies with even greater.

force to a quasi-judicial agency. He states:

^{8.} It is respectfully requested that the Trial Examiner reconsider his ruling excluding expert testimony concerning the adverse economic effects of production ceilings, and receive General Counsel's offer of proof on this subject.

The judiciary should not prescribe limitations on the economic policies of unions—such limitations must be debated in the political arena and determined through the legislative process. Summers, op. cit., supra, n. 48, at 1073.

Underscoring the irrelevance of the social appraisal of a given practice to an adjudicative proceeding is the fact that even after a committee of Congress has heard all viewpoints on a given matter and concluded that a practice is undesirable, between the conclusion and the enactment there is a long and uncertain path. In point is featherbedding, to which I have alluded. In contrast with the practice here involved, of which I have found no mention in the record of the extended hearings in 1947 preceding the drafting of the bills, Congress heard, a good deal of testimony on featherbedding.51 Yet in contrast with the House Bill, which contained a pervasive prohibition of the practice (LH 205), the ultimate enactment in 8(b)(6), as mentioned, prohibited it on the most limited basis.52 Senator Taft, in a statement which is quoted by the Supreme Court in its opinion in ANPA (supra, n. 52) upholding the Board's conclusion that 8(b)(6) did not forbid the particular kind of featherbedding there involved, explained that "the Senate conferees . . . while not approving of featherbedding practices," narrowed the prohibition because of the difficulty in articulating a standard, which would be specific enough in its application.

Exemplifying this aspect of legislative caution still further is the limited extent to which Congress acted in 1947 upon a prime target of the legislation, secondary boycotts. Here too, as the Supreme Court noted in Local 1976

^{51.} House Hearings, 80th Cong. 1947, Vols. 1-6 (GOP 1947).

^{52.} See ANPA v. N.L.R.B., 345 U.S. 100; Gamble Enterprises v. N.L.R.B., 345 U.S. 117.

Carpenters v. N.L.R.B., 357 U.S. 93, the legislation was not commensurate with the Congressional aversion to the practice. It limited the prohibition solely to a union's inducement of the employees of a neutral employer to strike in order to force him to engage in such a boycott—and it enlarged the prohibition 12 years later after a plenitude of enlightening experience under the earlier legislation, yet still short of doing so to the hilt. We might conclude this aspect of our discussion by noting the applicability to our situation of the Supreme Court's observation concerning the conduct in that case, as follows:

the result of conflict and compromise between strong contending forces and deeply held views on the role of organized labor in the free economic life of the nation and the appropriate balance to be struck between the uncontrolled power of management and labor to further their respective interests. This is relevant in that it counsels wariness in finding by construction a broad policy against secondary boycotts as such when from the words of the statute itself, it is clear that those interested in such a condemnation were unable to secure its embodiment in enacted law.

Rendering the above all the more pertinent to the situation before us are the explicit disavowals by the sponsors of 8(b)(1)(A), previously discussed, of their being at all "interested in . . . a condemnation" of the very matter which it is here contended had been outlawed thereunder.

(10)

To Recapitulate:

(a) The prohibiting clause of 8(a)(1)(A), even without the proviso, was not intended and does not apply to the kind of coercion which results from the application

of internal discipline of unions upon members in enforcement of their rules.

- (b) Even if 8(b)(1)(A) without the proviso were to be otherwise construed as applying to that kind of coercion, the proviso of 8(b)(1)(A), in accordance with the explanation of its purpose by the sponsors, precludes such a construction.'
- (c) The immunity of the proviso of 8(b)(1)(A) extends to all internal union affairs. This embraces the prescribing of rules by unions with respect to the acquisition and retention of membership and the employment of their internal disciplinary powers to enforce them, with no distinction as between expulsion, suspension, or fine.
- (d) The immunity of the disciplinary action under the proviso is not dependent upon the substantive content of the rule which it enforces.
- (e) The immunity thus conferred by the proviso was not intended to and does not bestow upon the action in question any affirmative protections of the Act, it merely confirms, in accordance with the intended scope of the section without the proviso; that internal union affairs do not fall within its prohibitions.
- (f) Whether the fines imposed by the Union here are validly collectible as debts is controlled by the law and policy of the State.

From all of the above, and the entire record, we derive the following:

Conclusion of Law

The Union did not violate Section 8(b)(1)(A) in assessing the fines in question, or in bringing suit in the State court to collect them.

RECOMMENDATION.

Upon the basis of all the above and the entire record, it is hereby recommended that the complaint herein be dismissed.

Nothing herein is intended to control or affect any issue in the State court litigation concerning the validity of either the fine or ceiling rule under the bylaws and constitution of the Union or under such law or policy of the State as its courts might deem applicable thereto.

Dated at Washington, D. C.

A. Norman Somers
Trial Examiner.

APPENDIX A

The relevant provisions of the National Labor Relations Act of 1935 (49 Stat. 449) as amended by the Labor Management Relations Act of 1947 (61 Stat. 136) are as follows:

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to selforganization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

UNFAIR LABOR PRACTICES

SEC. 8(a) It shall be an unfair labor practice for an employer—

- (1) to interfere with restrain, or coerce employees in the exercise of the rights guaranteed in section 7;
- (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization . . . to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a), in the appropriate collective-bargaining unit -covered by such agreement when made . . . Provided further, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;
- (b) It shall be an unfair labor practice for a labor organization of its agents—
 - (1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7; Provided, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; . . .

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

APPENDIX B

Bibliography on Restriction of Output among Piece or Incentive Workers

Millis & Montgomery, Economics of Labor (Organized Labor) (1945);

At p. 399:

Naturally, and related to the matter just discussed, piece rates have been closely associated with speeding, to which workers, whether unorganized or organized. object. The objection becomes all the stronger when management points to and uses the earnings of the fastest workers to justify its position that wages or piece rates should not be increased or that they should be reduced. And associated with faster work or speeding is the greater risk of work injury and overstrain, which compositors and others formerly emphasized in their struggles to secure "straight time"; health and earning capacity must be conserved.

At p. 462:

A considerable part of the restriction of output by American umons has been a product of the fixing and administration of piece rates. The employers, as we have seen, may insist on cutting piece rates when they yield earnings regarded as too high as tested by a daily wage, even, possibly, when the high earnings are due to the unusual application or efficiency of the workers engaged on the process. Years ago in the steel industry there were union rules limiting the

output of certain piece workers. The chief object was to protect against rate cutting. For the same reason, it was said, the Stovemounters Union of Detroit at one time forbade its members to earn more than \$4.50 per day. It was only after the Stove Founders' National Defense Association agreed that the earnings of a molder should be paid by comparison with the kind of rates paid for other work of like kind, that the Molders' Union agreed that "the placing of a limit upon the earnings of a member should be discontinued in shops of members of the S.F.N.D.A." For a generation before the arbitration agreement was entered into, the molders had limited output primarily to protect piece rates and the practice continued under the agreement until clause 16 was adopted. These are only a few of the many cases that may be cited in which limitation was resorted to in order to prevent rate cutting.

Union Policies and Industrial Management (Brookings Institution 1941) pp. 166-167:

Formal limits upon output . . . are found more frequently among pieceworkers than among timeworkers. At their inception the purpose of limits applying to pieceworkers is . . . partly to protect the union from being weakened by jealousies and dissensions arising from the fact that some workers receive better jobs than others, partly to prevent foremen from playing favorites in assigning jobs, and partly to prevent employers from cutting liberal piece rates or from using the high earnings of some workers in an argument against a general increase in piece rates. (Emphasis in text).

Kennedy, Union Policy and Incentive Wage Methods (Columbia University Press, 1945) at p. 111:

For the most part workers look upon restriction of output as a general preventive measure, the primary motive being to avoid cuts in existing rates or lower future rates which might result if present rates and standards were "spoiled" by high levels of production and earnings.

Douty, Wage Structures (Inst. of Ind. Rel., U. Cal., 1954) at p. 32:

A study some years by the Bureau of Labor Statistics of collective bargaining provisions relating to wage incentives points out that:

Much of the opposition of workers to incentive plans is due to past experience with rate cutting and the speed-up. The claim has been made that whenever workers became adept at an operation and increased their output, and thereby their earnings, management would re-time the job and cut the rate for the operation so that workers turned out more with no corresponding increase in pay. Piece rates were sometimes lowered without clear justification, or on the ground that some adjustment in machinery or process had warranted a re-timing of the work. Even where rate changes were justified by some change in operation, workers often felt that a more than proportionale reduction in rates had been made. Management also would re-time jobs after workers had hit their stride and then set the new, high production level as the normal standard for base pay, resulting in a speed-up.

With respect to the nature of specific union agreement provisions on wage incentives, this study states:

Most of the detailed provisions in the agreement are concerned with establishing safeguards and controls against abuse of the incentive wage principle. . . .

J. K. Louden (Production Manager, Glass and Closure Div. of Armstrong Cork Co.), Wage Incentives (1944), at pp. 29-30:

The Element of Fear in the Worker's Resistance to Wage Incentives

This fear and its accompanying resistance to incentives usually take the following patterns:

- 1. Their job will be de-emphasized to the degree that their skill and knowledge are no longer economic assets to them.
- 2. They will be required to work at a pace they cannot maintain without injury to their health, causing them to age prematurely.
- 3. There will be a reduction in the force, which will throw them out of work.
- 4. If they do not meet the standards every day they will either lose their jobs or be demoted.
- 5. The rate will be cut as production increases so that they will have to turn out more and more work for the same money.

Stein, Davis, & O'rs., Labor Problems in America (1940) at p. 463:

that their earnings must not mount sharply when they work on a piece basis. There have been cases where workers on a piece basis increased their production by 200 per cent or more, only to discover that the high weekly earnings stimulate the employer to cut the rates. One cut in rates follows another until the workers earn no more for the new production than they did for the old. It does not take many experiences of this sort to make workers feel that it is dangerous to produce too much, even on a piece basis.

Leiserson, The Economics of the Restriction of Output, pp. 63-6, reprinted in Bakke, Kerr & Anrod, Unions, Management, and the Public (2d ed. 1960) at p. 399:

From the time the young worker enters on his first industrial experience and meets the mass pressure for restriction to the end of his days in the shop when he is exerting pressure on yourger people to protect his earnings and his job, he works in an atmosphere charged with restriction. ... If "incentives" are dangled before him in the form of standard tasks, premiums, bonuses and other devices, he soon notices that the rate per piece goes down as the bonus or premium goes up; and he learns that the inducement is to turn out more product for each dollar of pay. When he is asked to work short-time because the company cannot use the output of the employees, or when he sees fellow workers laid off because a smaller number can turn out the amount of work the company wants, the dangers of "over-production" are forcefully brought home to him.

Van De Water, A Fresh Look at Featherbedding, Baylor Law Rev., Spring 1955, pp. 139-51, reprinted in Bakke, etc., op. cit., at 401-2:

Arguments in support of work restriction in specific instances include the claim that such practices are necessary to avoid substandard working conditions, technological employment, competition from those not earning their livelihood at the particular trade, unsafe working conditions (particularly in the case of railroad operation), job strain, temporary layoffs, the "speedup," the "stretch-out" (i.e., requiring an employee to cover too many jobs or machines), rate-cutting (i.e., requiring increased production for the same amount of pay, by raising output standards once increased efficiency is induced by a wage incentive system), routinized job operations, and the anonymity resulting from the modern assembly line.

In opposition to work restrictions it is argued that any substantial and general increase in real wages must arise out of increases in productivity and labor unions generally lack an appreciation of management's need to

increase productivity in the individual concern if wages are to be raised and competitive position is yet to be maintained. It is argued that output restrictions have caused unnecessary expense and have proved a selfish deprivation of the benefits of technological improvement to the public in general, at times destroying small businessmen as competitors where "union stabilization" programs are involved, and hindering the opportunity which would otherwise arise for workers as a whole to be financially better off. It is contended that restrictive practices are the principal reason for the poor financial condition of the railroads in this country. It is further argued that work restrictions will not prevent technological unemployment, and may indeed increase such unemployment through raising labor costs to the place where management is induced to install more labor-saving machinery. . . . (Emphasis in text.)

See also: Lytle Wage Incentive Methods (1942), Ch. 2, at p. 62: "Union Attitude Toward Incentives."

Dickinson, Compensating Industrial Effort (1951), Ch. 8, "The Standard Task or Time Allowance; Limitation of Output," pp. 126, et. seq.

DECISION AND ORDER OF NATIONAL LABOR RELATIONS BOARD

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

LOCAL 283, UNITED AUTOMOBILE, AIRCRAFT AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW-AFL-CIO (WISCONSIN MOTOR CORPORATION)

and.

Cases Nos. 13-CB-1059-1

RUSSELL SCOFIELD, an individual LAWRENCE HANSEN, an individual EMIL STEFANEC, an individual GEORGE KOZBIEL, an individual

13-CB-1059-2 13-CB-1059-3

13-CB-1059-4

On June 7, 1962, Trial Examiner A. Norman Somers issued his Intermediate Report in the above-entitled proceeding finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint and recommending that the complaint be dismissed, as set forth in the Intermediate Report attached hereto. Thereafter, the General Counsel and the Charging Parties filed exceptions to the Intermediate Report and briefs in support of their exceptions.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the exceptions, and briefs and the entire record in the case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner with the following additions.

The facts in this case are fully set forth in the Intermediate Report and will only briefly be touched upon here.

The Respondent Union, whose membership is restricted to employees of the Company, has been the bargaining representative of the Company's employees since 1937. Its present contract, like earlier ones, contains a union-security clause which provides that employees have the option of either joining and maintaining good standing in the Union, or rejecting membership but paying the Union a "service fee."

During the past 25 years there has been in effect a union rule, revised from time to time, setting produc-

tion ceilings on piece work, or, more accurately, limiting the amount of incentive pay a member may earn.1 As declared in the union bylaw, the rule is designed to implement the Union's "basic object . . . to protect members . . . in their employment and to give them as much security as the industry can provide:" In operation, the ceilings, in each of the five labor grades, impose a limitation on the amount a member may earn over the machine rate, the minimum contract rate for that job classification. At present the ceilings are set at between 45 and 50 cents per hour over the machine rate. The union does not require that the member cease production when he has attained the ceiling rate for the day; he may continue working, but, in order to comply with the rule, he must not report, for credit toward his earnings, any items produced in excess of the amount permitted to be earned under the production quotas. He must, by a bookkeeping entry, "bank" this production for later payment. An employee may draw on his "bank" when for one reason or another he fails to earn the basic machine rate or even the lower "day rate." This may occur, for example, when he is sick and unable to work, or his machine is out of order. The Company itself, however, places no limitations on an employee's earnings. It will, if he so desires, pay him immediately for all production which he reports.

Members who violate production ceilings are subject to a fine of \$1 for each violation, but persistent violators may be subject to a charge of conduct unbecoming a member, in which event a fine of \$100 or a lesser amount may be imposed and a member suspended. A member who pays a fine may also be expelled. It is undisputed,

¹ Approximately half of the Company's 800 or more employees work under an incentive pay plan.

however, that the Union's sanctions to enforce the rule may not be extended to impair a member's status as an employee. The rule of course has no application to nonmembers who may be employees of the Company.

The rule limiting incentive pay is not incorporated in the contract as a term of employment. Although the Company does not consider itself bound by the rule, and at various times during negotiations has unsuccessfully sought to induce the Union to drop the ceilings, the Company nevertheless as a practical matter has accepted the ceilings as an integral part of the modus operandi and has recognized the ceilings as forming an important element of its negotiated wage structure. So far as appears, the Company has never sought to discipline any of its employees for adherence to the Union's ceiling restrictions. The Company uses the ceilings in computing. wages and evaluating jobs. Ceilings have also played an important role in the negotiation of collective-bargaining agreements between the Company and the Union. Thus, in 1953, one of the Company's proposals was that the ceilings be increased at least 10 percent. The contract that year made provisions for a 13 cents per hour increase in ceilings. The 1956 strike settlement agreement provided for another increase in ceilings. In 1959, the Company made no request for the elimination of ceilings, but only requested that they be increased 10 cents.

Moreover, while abstaining itself from enforcing the ceiling rule, the Company voluntarily aids and cooperates with the Union in the administration of the rule. Thus, the Company joins in the "banking" procedures by making the necessary bookkeeping entries. The Company also allows the ceilings to be posted on its bulletin boards. And it assists the Union in policing enforcement

of the rule by making available to the Union the members' production records and allowing the union stewards to inspect such records on Company time without loss of pay.

At such an inspection, conducted in February 1961. the Respondent Union found that the Charging Parties had violated the rule by exceeding their production. quotas. The Charging Parties are all members of the Union, who, by their decision to join, have elected to subject themselves commonly with other union members to union regulation and discipline. Following a hearing before the Union's trial board, each of the Charging Parties was found guilty of conduct unbecoming a member. Penalties were assessed against them, consisting of up to a year's suspension from membership and fines ranging from \$50 to \$100. In October 1961, the Charging Parties having failed to pay the fines, the Union brought suit in a State court to recover the amount of the fines. No evidence as to the outcome of the suit is before us. No action has been taken, or threatened, to impair the job status of the individuals involved.

The complaint alleges, and the answer denies, that the Union's action in imposing fines for breach of its production rule constituted a violation of Section 8(b)(1)

(A) of the Act. That Section provides:

It shall be an unfair labor practice for a labor organization or its agents... to restrain or coerce... employees in the exercise of their rights guaranteed in Section 7, provided, that this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein.

In his full discussion of the issues, the Trial Examiner concluded, we believe correctly, that neither the legisla-

ing with and interpretating the Section since its enactment in 1947 as part of the Labor-Management Relations Act (the Taft-Hartley law) supports the view that Section 8(b)(1)(A) was intended to interdict the conduct under examination.

The General Counsel argues for a different reading of the legislative history, one that would give a broader interpretation to the language of the Section; he urges that the imposition of a fine constitutes restraint and coercion within the meaning of Section 8(b) (1) (A). Essentially, it is the General Counsel's position that the legislative purpose in enacting Section 8(b)(1)(A) was to protect the freedom of the individual workman from duress by the union as well as by the employer, and that it was the intent of Congress "to impose upon unions the same restrictions which the Wagner Act imposes upon employers with respect to violations of employee rights." While there may have been such a general legislative purpose, this is not to say that Congress did not place certain limitations on that purpose. For one thing) the legislative history of Section 8(b)(1)(A) points to a Congressional intent to reach only certain limited conduct on the part of labor organizations. Thus, the Supreme Court in Curtis Brothers, in commenting on the tenor of the expressions which preceded the Senate debate as to the Section's purpose, observed that "the note repeatedly sounded there is as to the necessity for protecting individual workers from union organizational tactics tinged with violence, duress or reprisal." The Conference Report makes it evident that the Section was

^{**} International Ladies' Garment Workers' Union v. N.L.R.B. (Bernhard Altman), 366 U.S. 731, 738.

N.L.R.B. v. Drivers, Chauffeurs, and Helpers, Local 639 (Curtis-Brothers), 362 U.S. 274.

so understood by the House. The House accepted the Senate bill as covering the same ground as its own proposed Section 12(a)(1), a Section which would have made unlawful the use of force, violence, physical obstruction or threats thereof to accomplish certain purposes associated with organizational activity and strikes.

. If, as the General Coursel contends, the decision in Bernhard Altman suggests a broader reach of Section 8(b) (1) (A), it is nonetheless evident that internal union disciplines were not among the restraints intended to be encompassed by the Section. Thus, as the Trial Examiner points out, when the introduction of Section 8(b)(1)(A) touched off expressions of apprehension that its language could be construed as interfering with the internal affairs of unions, Senator Taft, even before the proviso to the Section was introduced, affirmed that the sponsors had no intention to interfere with a union's internal affairs. The same opinion was voiced by Senator Ball on the introduction of the proviso. On that occasion he stated, "I merely wish to state to the Senate that the amendment offered by the Senator from Florida is perfectly agreeable to me. It was never the intent of the sponsors of the amendment to interfere with the internal affairs or organization of unions. The amendment of the Senator from Florida makes that perfectly clear." At a later point in the Senate Consideration of the bill

¹ Legislative History 546.

⁵ I Legislative History 20+-205.

^{*122} NLRB 1289, affirmed International Ladies' Garment Workers'. Union, AFL-CIO v. N.L.R.B. (Bernhards Atman) 366 U.S. 731. In that case the Court upheld the Board's anding that the execution of a collective-bargaining agreement with a minority union whereby that union is recognized as the exclusive bargaining representative of all employees in the unit, restrained and coerced employees in that unit, and that this restraint and coercion was practiced both by the company and the union.

Senator Ball stressed the limited scope of the prohibitory part of the Section when he explained that the proviso:

ing to interfere with the internal affairs of a union which is already organized. All we are trying to cover is the coercive and restraining acts of the union in its efforts to organize unorganized employees.

The expressed disavowals of the sponsors, and other legislative facts marshalled by the Trial Examiner, make clear that Section 8(b)(1)(A) was not intended to reach the conduct here involved, even without regard to the purpose of the proviso, because, as is pointed out, it was not the kind of activity with which Section 8(b) (1)(A) was concerned.

Proceeding from the premise that the prohibitory part of 8(b)(1)(A) was applicable to the type of conduct here involved, the General Counsel contends further that such conduct is not protected by the proviso to the Section. He concedes, however, that even though a fine be deemed coercive, it nevertheless would not violate Section 8(b)(1)(A) if the fine were merely an incident to "the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership." But because in this instance the fine was collectible as a debt and not by threat of expulsion only, the General Counsel argues that the fine had more than the incidental relationship which would exempt it from the reach of the Section.

We do not read the language of the proviso so narrowly. There is nothing in the legislative history which suggests that Congress intended to permit a union to expel a member for violation of a union bylaw, but not to fine him for the same infraction without expelling him;

¹ See International Association of Machinists v. Gonzales, 356 U.S. 617.

or that it could enforce the fine by expulsion from the union but not by suing for its collection.

On the contrary, as the Trial Examiner has shown, Congress was more concerned with placing restrictions on a union's right to expel than to fine members. Thus Section 8(c) (6) of the House bill more severely limited the right of expulsion from a union than did 8(c) (5) of the same bill which dealt with limitations on a union's right to fine its members. The latter merely enjoined the use of fines as a penalty for members exercising certain basic civil rights of the kind now protected in the "Bill of Rights" portion of the Labor-Management Reporting and Disclosure Act of 1959. Neither of these provisions prohibited a union from disciplining a member for the infraction of a union rule of the type here involved. As the Trial Examiner has so aptly observed, to accept the General Counsel's attempted distinction is to conclude that, despite the express disavowals by the sponsors of Section 8(b)(1)(A) of any intent to interfere in the internal affairs of unions and despite the rejection of House attempts to do so, the result of the enactment of present Section 8(b) (1) (A) was to impose more stringent restrictions on union discipline than even those prohibited in the rejected House measures.

In other words, it is most unlikely that with knowledge of the long existing union practice of enforcing internal union policies by fine as well as by suspension and expulsion, and disavowing any intent to interfere in the internal affairs of unions, Congress intended to leave a union with no power to deal with offending union members except, as the General Counsel asserts, either by tolerating them or by expelling them from membership, a procedure that could well prove self-defeating.

In support of his construction of the proviso to Section 8(b) (1) (A), the General Counsel relies on a certain dictum of the court in the Allen Bradley case, which, reversing the Board, held that it was not a violation of Section 8(a) (5) and (1) of the Act for an employer to insist as a condition precedent to entering into a collective-bargaining contract that the union agree to the employer's proposal limiting the right of the union to discipline union members for refraining from participating in strikes called by the union. The Board does not acquiesce in this decision or in the dictum upon which the dissent relies. Not only is the decision contrary to the Board holding in this as well as in other cases, but it is also inconsistent with holdings of other Courts;10 and with the same court's holding in the American Newspaper Publishers' case," where the court

11 American Newspaper Publishers' Association v. N.L.R.B., 193 F. 2d 782, 800-801 (C.A. 7).

^{*} Allen Bradley Company v. N.L.R.B., 286 F. 2d 442 (C.A. 7), setting aside 127 NLRB 44.

^{*}Minneapolis Star and Tribune Company, 109 NLRB 727, 729 ("... the imposition of a \$500 fine on Carpenter by the Respondent Union for his failure to engage in certain of its activities is not violative of Section 8(b)(1)(A) of the Act. It is well established that the proviso to Section 8(b)(1)(A) precludes any such interference with the internal affairs of a labor organization.")

N.W. (2d) 278 (Union fine of member for crossing a picket line during strike held arguably protected by the proviso to Section 8(b)(1)(A); UAW v. Woychik, 5 Wis. (2d) 528, 93 N.W. (2d) 336 (Union may recover fine levied against member for failure to picket during strike.); Retail Clerks v. Christiansen. Washington Justice Court, Grays Harbor County, 54 LRRM 2558 (Union may recover fines imposed against members who continued working during strike. "It is the court's opinion that inasmuch as there has been no interference affecting the right of defendants in their employment and that the action involves only the employees and the union, and the charges are based upon specific violations and the fines imposed under the authority of the bylaws, that this is an action which is one involving the internal affairs of the union and Sections 7 and 8 of the Act are inapplicable.

[A] union may reasonably discipline its members for infractions of its laws, rules and regulations so long as the discipline does not deprive the member of his property right.")

agreed with the Board that a union did not violate Section 8(b)(1)(A) by threatening to expel any member who worked in a composing room where all the employees were not members of the union.

It is also significant that while the Board, during the 12 years following Taft-Hartley, has interpreted Section 8(b) (1) (A) and its proviso so as not to interfere in a union's internal affairs,12 Congress has not indicated that a broader interpretation of the Section was intended or desired. Moreover, as pointed out by the Trial Examiner, the legislation which Congress did enact in 1959 sheds further light on the problem before us and buttresses the conclusions which we reach. The Landrum-Griffin amendments contain a fairly comprehensive code governing the internal affairs of labor organizations. Jurisdiction over these matters was not, however, given to the Board. Rather it was the Federal Courts which were authorized to enforce the new law.13 Furthermore, insofar as is relevant here, these 1959 amendments went no further than to impose certain notice and hearing requirements on the imposition of union discipline14 and prohibited the use of such discipline to prevent employees from exercising certain fundamental freedoms.15

¹² See Minneapolis Star and Tribune Company, 109 NLRB 727, 729. We do not agree with the General Counsel that there is an implication in the Board's decision in that case that the imposition of the fine was collectible only by threat of expulsion.

¹³ See McCraw v. United Association Local Union No. 43, U.S. District Court, Eastern District of Tennessee, 216 F. Supp. 655 (1963). See also Labor-Management Reporting and Disclosure Act of 1959, Title I, Section 102.

¹⁴ Labor-Management Reporting and Diselosure Act of 1959, Title I, Section 101(a)(5).

¹⁶ Labor-Management Reporting and Disclosure Act of 1959, Title I, Section 101(a)(2).

These laws show that Congress has not ventured to the outermost limits in regulating internal union affairs. Some subjects still remain unregulated under existing Federal law. Thus, we cannot agree that, 12 years earlier, Congress had enacted the substantial and far reaching limitations on the powers of unions to prescribe rules governing the conduct of their members, as urged by the General Counsel.

Our dissenting colleague argues forcefully that the proviso to Section 8(b)(1)(A) permits the imposition of union rules on employees as union members, but does . not apply to the enforcement of rules against employees as employees. Proceeding from this premise, the dissenting opinion then finds that the subjects of production and wages are matters "clearly related to employment and not to membership. . . . " But the conclusion does not follow the distinction. Obviously, production and wages are related to jobs. Jobs are related to employees and employees may, if they so desire, be union members. A union sule that a member is subject to a fine if he exceeds a production ceiling does not mean that he is subject to such a fine as an employee. Nor does it mean that his employment status is affected so long as the Union does not attempt to exact payment of the fine by pressure on his employer or discrimination in his job opportunities.

It should not need saying that unions exist for the purpose of collective bargaining with respect to wages,

¹⁶ See Aaron, The Labor-Management Reporting and Disclosure Act of 1959, 73 Harv. Law Rev. 851.

¹⁷ See the Supreme Court's observation in the Curtis case that later statutes may be taken into account in interpreting vague language of an earlier law. N.L.R.B. v. Drivers. Chauffeurs, etc., Local 639 (Curtis Brothers), 362 U.S. 274, 291-292.

hours, and conditions of employment. Necessarily, their constitutions and bylaws reflect this basic purpose. In a sense, virtually all union rules affect a member's employment relationship.

But the Board has not been empowered by Congress to police a union decision that a member is or is not in good standing or to pass judgment on the penalties a union may impose on a member so long as the penalty does not impair the member's status as an employee. Our dissenting colleague's view would require the Board to sit in judgment on union standards of conduct for its members even though such standards are not enforced by threats affecting the member's job tenure or job opportunities. Whether or not the Union's rule in this case is desirable or equitable is a matter we need not and do not decide. It is sufficient, in our view, that the Union deliberately restricted the enforcement of its rule to an area involving the status of a member as a member rather than as an employee.

We find, in argument with the Trial Examiner, that the Respondent did not violate Section 8(b)(1)(A) of the Act.

ORDER

IT IS HEREBY ORDERED that the complaint filed herein be, and it hereby is, dismissed.

Dated, Washington, D. C., Jan. 17, 1964.

FRANK W. McCulloch, Chairman John H. Fanning, Member Gerald A. Brown, Member National Labor Relations Board Member Jenkins, concurring:

I concur in the result reached by the majority, but would predicate the result on a more simplified basis which concedes much of the argument advanced by my dissenting colleague. Nothing in the Act seeks to regulate the right of a labor union to place a ceiling on the earnings of its members. Therefore the subject matter of the rule, like other union rules pertaining to matters such as meeting attendance requirements, cannot be said of itself to offend the Act even if it were an unreasonable rule. The only issue presented by the Charge is whether in some manner the enforcement of the rule has restrained or coerced the Charging Parties in their exercise of Section 7 rights.

In the context of this case, it cannot be said that enforcement of the rule is coercive since the Charging Parties were free either to join the Union and be subject to the rule, or refrain from joining and not be subject to the rule. The Charging Parties would have it both ways. It is axiomatic that the rights guaranteed under Section 7 are not absolute rights and that alternative choices must often be made by those who would exercise those rights. Had the Union here sought a benefit for its members which was denied to nonmembers, the action would clearly have been coercive. Cf. Radio Officers v. Labor Board (Gaynor News), 347 U. S. 17. Certain it is, however, that where, as here, the Union imposes restrictions upon its own members which are not imposed upon nonmember employees, the action may not logically be described as coercive. The fact that some members of the union dislike and refuse to abide by the rule no more causes it to violate the Act than did the top seniority accorded to employees of the larger of two merged employers in Trailmobile Co. v. Whirls, 331 U. S. 40, or to shop stewards in Aeronautical Lodge v. Campbell, 337 U. S. 521.

Dated, Washington, D. C., Jan. 17, 1964.

HOWARD JENKINS, JR., Member NATIONAL LABOR RELATIONS BOARD

Member Leedom, dissenting:

This case presents the question of whether a union that has unilaterally promulgated a restrictive scheme of work production quotas may, with legal impunity, enforce that scheme against employees, members of the union, through the imposition of severe retaliatory penalties, including monetary fines.

Since 1938, Respondent Union has had an established scheme of production ceilings or work quotas. The production ceilings, first formulated pursuant to a "gentleman's agreement" between union members, were later formalized by a union resolution, and finally became the subject of a union bylaw. The bylaw, inter alia, provides that members who fail to abide by the work quotas shall be subject to a fine, and, in the case of habitual offenders, discipline by the Union on the charge of conduct unbecoming a union member. At present the production

14 The bylaw, in pertinent part, reads as follows:

In case of persistent ceiling violations, the member will be charged with conduct unbecoming a Union Member.

A. The basic object of the Union is to protect members of the Union in their employment and to give them as much security as the industry can provide. The Local Union in its judgment and reasoning has established a production ceiling which it feels will bring more protection to the members. It follows that a member who is found in violation of the [sic] this rule is guilty of conduct unbecoming a union member.

B. Any member who violates these ceilings shall be subject to a fine of one dollar (\$1.00) for each violation. The violators shall be processed by not less than 3, nor more than [sic] than 5 members of the Executive Board.

ceilings limit an employee's earnings to 45 to 50 cents per hour over the machine rate, which is based on minimum employee production requirements.

The contract between the Employer and the Union contains a union-security provision. By its terms all employees are required to become members of the Union after the thirtieth day of employment or pay a service fee which shall not exceed the amount of the Union's monthly dues.

The Employer has placed no limits on the employees' production or earnings and has vigorously opposed such a limitation, but without success. The Company is in a highly competitive market, and the increased costs resulting from the Union's production ceilings have caused a decline in its competitive position. The record shows that the Union's production ceilings have reduced and slowed down production, that an employee can reach the production ceiling in five hours, and that the employees have read books, played cards, and talked in the remaining time.

In February 1961, the Union discovered that the Charging Parties had been violating the work quota rule. Subsequently, a hearing was held before the Union's trial board, and each of the Charging Parties was found guilty of "conduct unbecoming a Union member,"

While, in light of the presence of the service fee provision in the contract it can not be said as a matter of law that all employees were required to join the Union, it is obvious that the contract provisions left so little to choice that, as a practical matter, the employees were compelled to join the Union in order to obtain the most value for the money they were required to expend.

In spite of this, the employees produce more than the production ceilings allow. The excess is "banked" for payment in the future when an employee is unable, for any reason, to produce the maximum allowable under the production ceilings.

was fined \$50 to \$100, and was suspended from union membership. In October 1961, the Union brought suit against the Charging Parties in a state court to collect the fines.

On these facts, the General Counsel issued a complaint against the Union, charging that the fines that were imposed restrained and coerced employees in the exercise of their Section 7 rights and therefore violated Section 8(b)(1)(A) of the Act. My colleagues are validating the Union's actions. I disagree. In my opinion, my colleagues' holding misconstrues a very basic section of the Act, misinterprets Congressional intent, undermines Congressional policy, and disregards established precedent.

In refusing to abide by the Union rule, the employees were exercising their Section 7²² right to refrain from Union activity. In fining the employees, the Union was attempting to force these employees to cease exercising

RIGHTS OF EMPLOYEES

practice for a labor organization or its agents: (1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in Section 7: Provided, that this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein

³³ Section 7 of the Act reads:

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a)(3).

²⁸ Printz Leather Co., Inc., 94 NLRB 1312. My colleagues apparently concede that the Charging Parties were exercising their Section 7 right in refusing to limit their production pursuant to the Union's rule for, absent such right, it would have been unnecessary to reach the issues discussed in the majority opinion.

that Section 7 right. The question is whether the fine employed by the Union as a sanction to compel the Charging Parties to comply with the Union rule constitutes restraint or coercion within the meaning of Section 8(b) (1) (A), and, if so, whether the Union's action is nevertheless protected by the proviso to that Section. I think it is clear that the fines imposed do constitute such restraint and coercion, and that the proviso does not afford any protection to the Union.

The Supreme Court has left little, if any, room for argument over the meaning of the words "restrain or coerce" used in Section 8(b) (1) (A). In N.L.R.B. v. Drivers, Local No. 639 (Curtis Brothers), 362 U. S. 274, which involved the question of whether recognitional picketing by a minority union constituted a violation of Section 8(b) (1) (A), the Court, after a thorough analysis, concluded that Section 8(b) (1) (A) was "a grant of power to the Board limited to authority to proceed against union tactics involving violence, intimidation, and reprisal or threats thereof—conduct involving more than the general pressures upon persons employed by the affected employers implicit in economic strikes."

A careful reading of the Court's opinion shows that the word "reprisal," as used by the Court, means economic as well as physical reprisal, and specifically includes financial exactions." Thus, the Court referred to some

In this connection, I point out that the economic pressure inherent in a fine is not unlike the pressure caused by the threat of loss of employment which has always been recognized as economic "intimidation" or "reprisal" constituting a violation of Section 8(b) (1) (A). (See, for example, International Association of Bridge, Structural & Ornamental Iron Workers, 112 NLRB 1059; Marlin Rockwell Corporation, 114 NLRB 553, 562; Tellepsen Construction Co., 122 NLRB 568; Local 138 International Union of Operating Engineers (Nassau & Suffolk Contractors Assn.), 123 NLRB 1393, 1396. In my opinion there is little difference between a union's causing the discharge of an employee for refraining from engaging in concerted activity, and a union's fining

of the examples mentioned by Senator Ball in the legislative debates involving threats of "violence, job reprisals and such repressive assertions as that double initiation fees would be charged those who delayed joining the union," as the type of conduct against which Section 8(b)(1)(A) was directed; and the Court summed up the "central theme" of the legislative debates on the Section as seeking "the elimination of the use of repressive tactics bordering on violence or involving particularized threats of economic reprisal."25

In the later International Ladies' Garment Workers' Union v. N.L.R.B., (Bernhard-Altmann) case, 366 U. S. 731, the Court set forth the proposition that Section 8(b) (1) (A) prohibited "unions from invading the rights of employees under Section 7 in a fashion comparable to the activities of employers prohibited under Section 8(a) (1)," pointing out that it was the "intent of Congress to impose "pon unions the same restrictions which the Wagner Act imposed on employers with respect to violations of employee rights."²⁶

The Board itself in the past has read "restrain or coerce" in Section 8(b)(1)(A) in a manner consistent with the ordinary meaning of the term. Thus the Board has held that computation by sanctions, such as fines and

the partial, or total, equivalent of his salary for refraining from engaging in concerted activity. Each is an equally potent form of economic restraint and coercion, and the net effect of each on the employees involved could be identical.

of Senator Taft in which he stated that Section 8(b)(1)(A) was intended to outlaw threats of "economic reprisal," and also cited with approval the language of the Board's decision in Perry Norvell Co., 80 NLRB 225, listing economic reprisal as one of the means proscribed by Section 8(b)(1)(A).

²⁸ Bernhard-Altmann, supra, at p. 738.

expulsion from membership, "are in fact coercive," and has also found that other forms of pressure directed against employees, including threats not to process grievances, threats of union disciplinary action and expulsion, and causing a reduction in seniority, likewise constitute restraint and coercion within the meaning of Section 8(b) (1) (A).

Accordingly, consistent with the foregoing authoritative case law, I am of the opinion that the fines levied by the Union against the Charging Parties in the instant case constitute restraint and coercion under Section 8(b) (1) (A) of the Act. 31

The proviso to Section 8(b)(1)(A) does not compel a contrary conclusion. That proviso excepts from the

^{**} Peerless Tool and Engineering Co., 111 NLRB 853, 857; see also Minneapolis Star and Tribune Co., 109 NLRB 727, in which the Board adopted the Trial Examiner's conclusion that a fine was a "form of coercion."

^{**} Ibid.

** Local 401, International Brotherhood of Boilermakers (M.A. Roberts & Co.,), 126 NLRB 832, 834; United States & Allied Products Workers (Gibsonburg Lime Products Co.), 121 NLRB 914.

³⁰ Miranda Fuel Company, Inc., 140 NLRB 181. 31 The legislative history of Section 8(b)(1)(A) fully supports this interpretation that the language, "restrain or coerce," covers the conduct herein. Section 8(b)(1)(A) originated in the Senate as an amendment to S. 1126. It was sponsored by a group of Senators who could "see no reason whatsoever why [unions] should not be subject to the same rules as the employers" and accordingly introduced Section 8(b) (1) (A) as a corresponding section to 8(a) (1). (Senate Report No. 105 on S. 1126, Supplementary views, Leg. Hist, of the LMRA, 1947, Vol. I, p. 456) Senator Ball, who introduced the amendment, explained that its purpose was "to insert an unfair labor practice for unions identical with [Section 8(a)(1)] ..." which was essential "to equalize the rights and responsibilities of both employers and unions in this field, to really assure to employees the fredom supposedly guaranteed in Section 7, ..." (Leg. His. of the LMRA, (1947), Vol. II, p. 1018, 1021.) During the debates, Senators repeatedly stressed that Section 8(b)(1)(A) was to be read and interpreted as broadly as its Wagner Act counterpart. When Senator Pepper asked what the interpretation of the language "restrain or coerce" would be, Senator Taft answered that "the Board has been defining those words for 12 years . . ." and although the "application to labor organizations may have a slightly

ambit of 8(b)(1)(A) only such restraint or coercion that results from a union's application of its rules relating to "the acquisition or retention of membership."

different implication . . . from the point of view of the employee the two [sections] are parallel." (Leg. Hist. of the LMRA, 1947, Vol. II,

p. 1028, and to the same effect p. 1032-33.)

Contrary to my colleagues, it does not appear that Congress intended to limit Section 8(b)(1)(A) to any particular type of retraint or coercion. In the course of the debates, examples of the conduct that would be prohibited by Sestion 8(b)(1)(A) included threats of higher initiation fees or higher dues, "retaliatory" internal union disciplinary action, threats to strike, threats to picket, threas of loss of employment, economic pressure, and misrepresentation. (Leg. Hist. of the LMRA (1947) Col. II, pp. 1018-1019; 1200; 1205; p. 1029; p. 1030; p. 1031; p. 1192-93.) No attempt was made by Congress either to exhaust or to construct the scope of the statutory language. Further, I do not agree with my colleagues that the House understood that Section 8(b)(1)(A) covered only that conduct which had been dealt with under Section 12(a)(1) of the House Bill (H.R. 3020). Rather, the House Conference Report shows that Section 8(b)(1)(A) included, but was not limited to, the conduct outlawed by Section 12(a)(1) of the House Bill. Leg. Hist. of LMRA, 1947, Vol. II, p. 546.

33 The legislative history of the proviso clearly shows that the restrictive terms in which the proviso was written were not chosen by accident, but by design, and that Congress meant just what it said, no more. The proviso originated in the Senate and was offered by Senator Holland as an amendment to Section 8(b)(1)(A). In introducing the amendment, Senator Holland stated that the proponents of Section 8(b)(1)(A) had not intended that section "to affect at least that part of the internal administration which has to do with the admission or the expulsion of members, that is with the question of membership," and that his amendment (the proviso) "would make clear that [Section 8(b)(1)(A)] would have no application to or effect upon the right of a labor organization to prescribe its own rules of membership either with respect to beginning or terminating membership." (Leg. Hist. of LMRA, 1947, Vol. II, pp. 1139, 1141.) Senator Ball, who accepted the proviso as an amendment to Section 8(b)(1)(A), replied that "it was never the intention of the sponsors of [Section 8(b)(1)(A)] to interfere with the internal affairs or organization of unions," and he subsequently described the proviso more specifically as covering "the requirements and standards of membership in the union itself." (Leg. Hist. of the LMRA, 1947, Vol. II, p. 1141; p. 1200.) In the face of these authoritative statements from the two men in the Senate most intimately acquainted wih he proviso, I cannot, as my colleagues do, subscribe to an interpretation based on the more general characterizations of certain legislators.

As the Board stated in Marlin Rockwell Corp., 114 NLRB 553, 562:

As we read the 8(b) (1) (A) proviso, its sole purpose is to guarantee to unions the privilege, as a voluntary association, to determine both who shall be a union "member" and what substantive conditions a "member" must comply with in order to acquire or retain union membership status. It is for this reason that the Board cannot and will not judge the fairness or unfairness of internal union determinations which may enable or disable particular individuals to obtain the incidental benefits of union membership as provided by internal union legislation. (Emphasis supplied.)³³

And more recently, in Allen Bradley Co. v. N.L.R.B., 286 F. 2d 442, the Seventh Circuit shared this view of the scope of the proviso saying:

... [The] Board strenuously insists that the Company proposal was not a subject for bargaining because the Union in its coercive activities was protected under the proviso in Section 8(b)(1)(A), which authorizes the Union to prescribe its own rules "with respect to the acquisition or retention of membership therein." True, the fines which the Union had previously imposed and about which the Company was concerned were authorized by Union rule. Even so, there is nothing in the situation before us which indicates that such fines bore any relation to the "acquisition or retention of membership." The Board evidently recognizes this because it argues, "imposition of the fine is merely a step in determining membership status; non-payment leads to expulsion." We assume that a union has broad powers in prescribing rules relative to the acquisition and retention of its members. However, that power, in our view, is not absolute. It goes beyond

^{**} See also The Babcock & Wilcox Co., 110 NLRB 2116, 2132-3.

any permissible limit when it imposes a sanction upon a member because of his exercise of a right guaranteed by the Act. Coercive action whether by way of fine, discharge or otherwise, which deprives a member of his right to work and his employer of the benefit of his services, cannot be said to relate only to the internal affairs of the union. (Emphasis supplied.)³⁴

I find the rationale of these cases most persuasive for it comports with the language of the proviso itself as well as its legislative history. This rationale, moreover, achieves the accomodation intended by Congress between the rights Congress guaranteed employees and the right of unions to determine their own qualifications for membership. In my opinion, therefore, it cannot reasonably be said that the Union's conduct here related to its right "to prescribe its own rules with respect to the acquisition or retention of membership . . ." Accordingly, I conclude that Respondent's conduct is not protected by the proviso.

According to my colleagues, the proviso to Section 8(b)(1)(A) protects all internal union affairs or all action taken pursuant to the union's rules and internal processes. They attempt to prove that the proviso does not mean what it says by arguing that Congress did not intend to distinguish between expulsion and any other form

the ground that the Court "was not called upon to find" whether the union had a right under Section 8(b)(1)(A) to fine a member for crossing a picket. line and that, accordingly, the above portion of the opinion was obiter dictum. However, as the portion of the Court's opinion quoted above clearly shows, and as a reading of the Board's decision and brief in that case will confirm, the Board argued in that case that the union's conduct which the employer wished to subject to bargaining was protected by the proviso to Section 8(b)(1)(A). Therefore, it cannot rightly be said, as my colleagues do, that the Court's discussion of this issue "was not essential to a decision in the case."

of union discipline, such as a fine, in the application of the proviso. However, in view of the special treatment Congress gave expulsion, as opposed to any other form of coercion by union discipline, I think that Congress did intend such a distinction. Employees are specifically protected against coercion in the form of expulsion by the second proviso to Section 8(a)(3), which guarantees employees that expulsion for any reason other than non-payment of dues and fees will not imperil their job security. Thus, Congress preserved the right of unions to deny membership to, or terminate the membership of, whomever they pleased regardless of the reason; but, at the same time, Congress insulated employees from coercion by making sure that they would suffer no economic consequences as a result of such action.

But even assuming that the proviso has a broader reach than I would ascribe to it, I would still disagree that the matter here involved is one that is merely a matter of internal union regulation. Employees may occupy a dual status: first, is their status as employees; second, is their

... Congress left labor organizations free to adopt any rules they desired governing membership in their organizations. Members could be expelled for any reason and in any manner prescribed by the organization's rules, so far as 8(b)(1)(A) is concerned.

³⁵ My colleagues argue that no action has been taken here to impair the employees' job status or job opportunites. Apparently, they are unwilling to recognize that impairment of job status or job opportunities can take the form of restricting an employee in his earnings where, as here, that employee is willing to work and the employer wants the benefit of his services. That the fines were intended to have this restrictive effect cannot be denied.

Hist. of LMRA, 1947, Vol. II, p. 1141-1142 and also p. 1096-97. As shown by the above rationale, there is nothing inconsistent in the decision of the Court of Appeals for the Seventh Circuit in Allen Bradley and the decision of the same court in American Newspaper Publishers' Association v. N.L.R.B., 193 F. 2d 782. The latter case involved a union's threat to expel members, conduct which specificially falls within the proviso. Speaking of the proviso, the court said:

status as union members. Those matters affecting employees as union members may appropriately be referred to as internal union affairs. Those matters which affect employees as employees are not internal union affairs. Of course, it is quite possible that some matters may affect both the employment relationship and the membership relationship, but to the extent they involve the former, they are not internal union affairs. Here, I am satisfied that the Union's attempt to control production and wages, which are subjects clearly related to employment, and not to membership, is not merely an internal matter.

Under my colleagues' reading of the proviso, it would appear that the Union can turn any employment matter or Section 7 right into an internal union affair simply by adopting a union rule or bylaw dealing with the subject and disciplining employees thereunder." But there is no evidence that Congress ever intended to permit the subversion of employees' rights by unions under the guise of

For example, prusuant to a union rule or bylaw, unions, under my colleagues' decision, could now fine employees for filing charges with the Board against the union; for testifying against the union in Board proceedings, for filing a decertification petition, for refusing to give the union a copy of any statement made to a Board agent, for giving a statement to a Board agent without the union's approval, for refusing to participate in unlawful union activity, for working with nonunion employees, for working with Negro employees, for filing a grievance not approved by the union, for producing more than a certain number of items per day, and for working more than 30 hours per week.

regulating the conduct of union members. In short, I think that when unions use the union membership of employees — membership which may, or may not, be voluntary — as a means of encroaching on their rights as employees, which Congress did regulate, the unions subject themselves to the sanctions of Section 8(b)(1)(A) of the Act. More particularly, by imposing fines on these employees because they exceeded the Respondent Union's unilaterally established work production quotas the Respondent Union took action which went beyond any permissible limit, that is, the action taken did not relate only to the internal affairs of the Respondent Union but imposed a sanction on its members because they exercised their right, guaranteed by the Act, not to go along with the Union imposed production quotas.

Accordingly, for all the foregoing reasons, I would find that the Respondent violated Section 8(b) (1) (A) of the Act, as alleged.

Dated, Washington, D. C., Jan. 17, 1964.

BOYD LEEDOM, Member
NATIONAL LABOR RELATIONS BOARD

v. Borden 373 U. S. 690, in which the Supreme Court recognized that even though the union's action was based on the employee's failure to comply with internal union rules "it is certainly 'arguable' that the union's conduct violated Section 8(b)(1)(A), by restraining or coercing Borden in the exercise of his protected right to refrain from observing those rules..." The Court went on to distinguish its earlier decision in I.A.M. v. Gonzales, 356 U. S. 617, on the ground that Gonzales involved matters relating to expulsion which was an internal union affair, not within the Board's competence by virtue of the proviso to Section 8(b)(1)(A). See also Local 207, International Association of Bridge, Structural and Ornamental Iron Workers Union v. Perko 373 U. S. 701.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

September Term, 1967

January Session, 1968

No. 14698

RUSSELL SCOFIELD, LAWRENCE HANSEN, EMIL STEFANEC; and GEORGE KOZBIEL,

Petitioners.

Petition for Review of an Order of the National Labor Relations Board.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

March 5, 1968

Before KNOCH, Senior Circuit Judge, and SWYGERT and CUMMINGS, Circuit Judges.

CUMMINGS, Circuit Judge. Petitioners, four employees of Wisconsin Motor Corporation ("the Company"), ask us to set aside an order of the National Labor Relations Board dismissing an unfair labor practice complaint that had issued upon their charges against their Union.

Petitioners are members of a Union that has been the bargaining representative of the production employees

¹Local 283, United Automobile, Aircraft and Agricultural Implement Workers of America, UAW-AFL-CIO. The parent Union is an intervenor.

of the Company since 1937. The collective bargaining contract requires such employees to belong to the Union or to pay it a service fee equivalent to dues. The Company is based in West Allis, Wisconsin, where it manufactures motors. Half of its 850 production employees, including these petitioners, are compensated on a basis permitting them to earn amounts above their basic hourly wages by producing at a rate in excess of established hourly norms of output.

In 1944, the Union membership adopted a resolution providing in substance that "the men turn in [report for payment] no more than 10 cents per hour over and above the new machine rates." In 1946, the membership approved fines as penalties for violation of that ceiling rule. The penaltics are presently contained in a February 1961 Union by-law which provides that any member violating the production ceilings is "guilty of conduct unbecoming a Union member" and subject to a fine of \$1.00 for each violation. The by-law also provides that in case of persistent ceiling violations, the offender would be charged with "conduct unbecoming a Union member." If a member were found guilty of such conduct, he could be assessed with a maximum fine of \$100 (enforceable within a specified time by automatic suspension or expulsion) or suspended or expelled from membership. The Union's sanctions do not impair a member's status as an employee of the Company.

Ceilings were established from time to time through collective bargaining between the Company and the Union although the Company did not agree to limit wages accordingly. Thus if an employee produced work in excess of the ceilings, the Company would on request pay him for his actual production without regard to the ceilings. So far the Company has been unsuccessful in

its bargaining for the elimination of the Union ceiling rates, but the ceilings on all piecework jobs were increased in July of 1953 and August 1956. The ceilings in effect at the time of this dispute were between 45 and 50 cents above the machine rates.

By Union rule, any production which a production employee member has turned out at a pace which would yield hourly rates above the ceiling rates is not to be reported to the Company for immediate compensation. Instead, such members are required to "bank" with the Company their earnings in excess of ceilings. On occasions when they receive less than ceilings (for example, through absence or enforced idleness), the Union permits the members to draw upon their "bank" by charging the Company for work previously produced but not reported for wage purposes. Although the Company normally acquiesces in the "banking" system, if an employee chooses to disregard the Union rule and report all production for immediate payment, the Company, as noted, will pay him even though the Union ceilings are exceeded.

In 1946, the Union first began enforcing its "banking" system by imposing fines. In 1961, the Union found that six members had violated the "banking" system by reporting to the Company for immediate payment production at a rate in excess of the Union ceilings. Two members were fined \$35 each and paid their fines. Two of the petitioner members were fined \$100 each, the third was fined \$75, and the fourth was fined \$50. Instead of paying their fines, the four petitioners filed unfair labor practice charges with the Regional Director of the National Labor Relations Board in May 1961. In October 1961, the Union filed a suit to collect the fines in the

Civil Court of Milwaukee County, Wisconsin, where it is still pending. In December 1961, the General Counsel of the Board issued a complaint charging that the Union, in fining and suing petitioners, had restrained and coerced them in the exercise of their rights under Section 7 of the National Labor Relations Act and thereby violated Section 8(b) (1) (A) of the Act. The Union and Company have taken no measures to impair the job status of the petitioners.

The Trial Examiner and the Board concluded that Section 8(b) (1) (A) had not been violated and dismissed the complaint. In view of the authoritative construction of that Section in National Labor Relations

Board v. Allis-Chalmers Mfg. Co., 388 U.S. 175, we must deny the employees' petition for review.

As early as 1951, this Court construed the proviso in Section 8(b) (1) (A) in American Newspaper Publishers Association N. National Labor Relations Board, 193 F.2d 782 (7th Cir. 1951), affirmed on other grounds 345 U.S. 100. There the union threatened to expel members for violation of a rule forbidding them to work in a shop with non-members. Even though the expulsion

Section 7 grants employees the right to refrain from concerted activities. It provides in pertinent part (29 U.S.C. § 157):

[&]quot;Employees shall have the right to " engage in " concerted activities " , and shall also have the right to refrain from any or all of such activities " ."

Section 8(b)(1)(A) provides in pertinent part (29 U.S.C. § 158 (b)(1)(A)):

[&]quot;(b) It shall be an unfair labor practice for a labor organization or its agents —

[&]quot;(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: Provided. That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein ""."

might involve the loss by the employee of his job and other economic benefits such as pension and mortuary provisions, we held (at pp. 800-801, 806):

"Under this limitation [proviso] Congress left labor organizations free to adopt any rules they desired governing membership in their organizations. Members could be expelled for any reason and in any manner prescribed by the organization's rules, so far as § 8(b)(1)(A) is concerned. This interpretation has support in the legislative history of the Act. It is also significant that while the Board has been so interpreting this section of the Act during the past four years, Congress has not amended the section to indicate that a broader interpretation of the section was intended or desired. It is not within the power of the courts to write into this section of the Act, by interpretation, language which would broaden its scope.

"* * * the proviso in § 8(b)(1)(A) permits unions to enforce their internal policies upon their membership as they see fit."

In National Labor Relations Board v. Amalgamated Local 286, 222 F.2d 95 (7th Cir. 1955), the union threatened to deprive certain members of group and hospitalization insurance coverage because they had refused to pay various disciplinary assessments and fines which the Union had imposed upon them, Following the lead of American Newspaper Publishers Association, the Court held that under the proviso in Section 8(b)(1)(A) the union's threatened withdrawal of the insurance rights of the complaining employees as a disciplinary measure was in full conformity with its right to regulate its internal affairs.

Thus in this Circuit, even before the decision in Na-/ tional Labor Relations Board v. Allis-Chalmers Mfg. Co., 388 U.S. 175, great breadth was accorded to the proviso in Section 8(b) (1) (A). In Allis-Chalmers, the opinion of the Court holds that the words "restrain or coerce" used in Section 8(b)(1), as shown by the legislative history of the Section, were not meant to encompass internal affairs of unions. In other words, internal union disciplines are not among the proscribed restraints. In reaching this conclusion, the Court was partly motivated by our national labor policy that clothes a union with powers analogous to a legislature, with union rules enacted by the majority becoming binding on the minority. The Court noted that in the case of a strong union, expulsion from membership is a far more severe penalty than a reasonable fine (at p. 183).4 The Court's examination of the legislative history of Section 8(b)(1)(A) convinced it that the statute does not prohibit union imposition of disciplinary fines and suits to collect them. In reaching its conclusion that the body of Section 8(b)(1)(A) was inapplicable to fines and collection suits aimed at union members crossing picket lines and working during lawful strikes, the Court found cogent support in the proviso to Section 8(b) (1), stating (at pp. 191-192):

"At the very least it can be said that the proviso, preserves the rights of unions to impose fines, as a lesser penalty than expulsion, and to impose fines which carry the explicit or implicit threat of expulsion for nonpayment. Therefore, under the proviso the rule in the UAW constitution governing fines is valid and the fines themselves and expulsion for non payment would not be an unfair labor practice."

^{*}See also Cox, "The Role of Law in Preserving Union Democracy," 72 Harv. L. Rev. 609, 612, 622-623 (1959).

The Court found it unnecessary to decide whether Section 8(b(1)(A) "proscribes arbitrary imposition of fines, or punishment for disobedience of a fiat of a union leader" (at p. 195).

In his concurring opinion, Mr. Justice White relied more on the proviso to Section 8(b)(1)(A) than on legislative history showing the inapplicability of the "restrain or coerce" language of the body of the Section. In joining in the opinion of the Court, he noted that there might be some internal union rules "which on their face are wholly invalid and unenforceable" (at p. 198).

Union opposition to piecework has a history in the labor union movement dating at least back to 1908. Fines and expulsion of members for violating the present and antecedent ceilings have been the rule for 22 years. We are told that the work of a majority of these employees would be jeopardized by younger, more energetic employees, and that the rule is therefore intended to protect the well being of all members, for if the younger, employees received higher pay by increased production, the older members, unable to turn out similar piecework quantities, would be demoralized and even face lay-offs. As the Trial Examiner pointed out, ceiling rules derive from a legitimate, traditional interest in union objectives. They reflect fears of (1) employees working themselves out of jobs by overproduction; (2) the establishment of a new productive norm lowering the piecework rate and the compensation for actual production; (3) morale-threatening jealousies and (4) health problems caused by too much pressure. These factors were cov-

It should be noted that the amounts of the instant fines are reasonable, so that there is no need to read Section 8(b)(1) as barring court enforcement of them. We need not consider whether excessive fines would be proscribed by that Section.

See Slichter, Union Policies and Industrial Management (1941), pp. 285-286.

ered in some detail in the excerpts from various labor authorities appended to his report (145 NLRB at pp. 1138-1141. One such authority explained the purpose of ceiling limits as follows:'

"At their inception the purpose of limits applying to pieceworkers is not primarily to make work but partly to protect the union from being weakened by jealousies and dissensions arising from the fact that some workers receive better jobs than others, partly to prevent foremen from playing favorites in assigning jobs, and partly to prevent employers from cutting liberal piece rates or from using the high earnings of some workers as an argument against a general increase in piece rates. Such limits have in the past been common among the glass bottle blowers, the flint glass workers, the potters, the stove molders, and in 1940 are being imposed by the leather workers in Massachusetts."

Thus the rule has a rational basis, and we cannot say that it was not reasonably calculated to achieve a permissible end. Accepting the Allis-Chalmers stricture that in considering questions of union discipline a union is comparable to a legislature, our function is to determine whether these fines conform to policies formulated by the Union and not violative of its constitution or of federal law. Since the end here was a legitimate union objective and the means were appropriate to enforce it, our hand should be stayed. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 420. Enough has been said to show that the Union's imposition of these fines was not arbitrary and that the rules themselves are grounded on

¹ Slichter, op. cit., pp. 166-167; see also pp. 296-305.

Summers, "Legal Limitations on Union Discipline," 64 Harv. L. Rev. 1049, 1073-1074 (1951).

a long-standing policy and cannot be deemed invalid or unenforceable on their face.

Petitioners argue that the present rule circumvents the bargaining process, and that the Union should have to obtain a provision against incentive pay through collective bargaining with the Company. Since petitioners concede that the Union can validly impose ceilings through collective bargaining, it is no great departure to allow them to be imposed by a disciplinary rule enforcing ceilings already established by collective bargaining. If a union has validly established a policy against overproduction, it must have the concomitant power to discipline members who violate ceilings. Cf. Summers, "Legal Limitations on Union Discipline," 64 Harv. L. Rev. 1049 (1951). Discipline has been described by the same author as the criminal law of union government. "The Law of Union Discipline: What the Courts Do in Fact," 70 Yale L.J. 175, 178 (1960).

As the intervenor pointed out, the rule enforced in Allis-Chalmers was of more serious economic consequence to the employees, for they were not permitted to work during that strike and their jobs might be forfeited. Here the employees were permitted to work even in excess of ceilings, with the additional earnings deferred under the Union's "banking" system. Their job rights were unaffected by the rule. Petitioners assert that "banking" involves a very small amount of the Company's production and does not overcome the Union's limitation on production, but under Section 8(b)(1)(A) of the Act, as interpreted in Allis-Chalmers, the Union rule would survive even if there were no provision to "bank" excess earnings.

Petitioners depend principally on Allen Bradley Company v. National Labor Relations Board, 286 F.2d 442

(7th Cir. 1961). There the question was whether the union was obliged to bargain in good faith over a collective bargaining contract provision proposed by the employer limiting the union's right to discipline or fine its members. The holding was that the proposals made by the company were a proper subject for collective bargaining. The question for resolution by this Court was not whether union discipline of members violates Section 8(b)(1)(A). Furthermore, in that case, Judge Major stated (at p. 446):

"Coercive action, whether by way of fine, discharge or otherwise, which deprives a member of his right to work and his employer of the benefit of his services, cannot be said to relate only to the internal affairs of the union."

In the present case, no member has been deprived of his right to work nor has the employer been deprived of the benefit of a member's services. To the extent that a dictum in Allen Bradley disapproves union fines and collection suits aimed at members crossing the union's picket line and continuing to work for their employer, that dictum was flatly rejected in Allis-Chalmers and is no longer viable. But as Allen Bradley still holds, the Wisconsin Motor Corporation can require the Union to bargain over a demand to give up its ceiling rule.

Petitioners rely on Printz Leather Co., Inc., 94 NLRB 1312 (1951), where the union threatened to strike if the employer did not discharge an employee who the union felt was working too fast. Printz is inapplicable because there the union's objective (unilateral imposition of production ceilings) and methods (threats to force the employer to discharge the employee) were manifestly improper. Associated Home Builders of Greater East Bay, Inc., v. National Labor Relations Board, 352 F.2d 745, 751-752 (9th Cir. 1965); National

Labor Relations Board v. Brotherhood of Painters, 242 F.2d 477, 480-481 (10th Cir. 1957). They also rely on Charles S. Skura, 148 NLRB 679, 683 (1964), which held that the union violated Section 8(b) (1) (A) by fining an employee-member for filing an unfair labor practice charge against the union without first exhausting internal union remedies. The Board held that the union's objective was at odds with policy considerations because "'no private organization should be permitted to restrict any person's access to courts of justice'". No policy considerations of comparable strength militate against the Union rule here at issue.

The petition for review is denied.

No. 14693

KNOCH, Senior Circuit Judge. (dissenting) I think we are in error in concluding that Allis-Chalmers is dispositive of the case before us, and that there is a difference here only of degree and not of kind. The forceful dissent of the four Justices in Allis-Chalmers and the limited concurrence of Mr. Justice White seem to me to dictate a very cautious application of the principle of that case to other cases (such as this one) which involve no impairment of the collective bargaining power and its concomitant strike weapon. I fear that the majority have unduly extended the scope of Allis-Chalmers. In my opinion the coercive fines here imposed constituted an unfair labor practice, and the Board's dismissal of the complaint herein should be reversed.

This question is now awaiting argument in the Supreme Court in Industrial Union v. National Labor Relations Board, No. 796, present Term. No view is expressed herein as to the correctness of the Skura rule.

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Chicago, Illinois 50604 Tuesday, March 5, 1968

BEFORE

HON. WIN G. KNOCH, Senior Circuit Judge HON. LUTHER M. SWYGERT, Circuit Judge HON. WALTER J. CUMMINGS, Circuit Judge

No. 14698

RUSSELL SCOFIELD, LAWRENCE HANSEN; EMIL STEPANEC and GEORGE KOZBIEL, PETITIONERS

V.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

Petition for Review of an Order of the National Labor Relations Board

This cause came on to be heard on the petition for review of an order of the National Labor Relations Board and the record from the National Labor Relations Board, and was argued by counsel.

On consideration whereof, it is ordered by this Court that the petition to review and set aside the order of the National Labor Relations Board dated May 18, 1964, denying the motion of the petitioners for reconsideration of the decision and order of the National Labor Relations Board dated January 17, 1964, be, and the same is hereby

DENIED in accordance with the opinion of this Court filed this day; and upon presentation, an appropriate decree will be entered.

A True Copy:

Teste:

/s/ Thomas F. Strubbe, Chief Deputy
Clerk of the United States Court of Appeals
for the Seventh Circuit

NATIONAL LABOR RELATIONS BOARD

OFFICE OF THE GENERAL COUNSEL

Washington, D.C. 20570

April 3, 1968

Kenneth J. Carrick, Esquire Clerk, United States Court of Appeals for the Seventh Circuit 1212 Lake Shore Drive Chicago 10, Illinois

> Re: No. 14698, Russell Scofield, Lawrence Hansen, Emil Stefanec, George Kozbeil v. N.L.R.B.

Dear Mr. Carrick:

We are enclosing eight mimeographed copies of the Board's proposed decree in the above-entitled matter. After entry of the decree by the Court we would appreciate your returning one certified copy thereof to this office, and sending another certified copy to the Regional Director whose name and address are listed below.

Certificate of service is also enclosed.

Very truly yours,

Marcel Mallet-Prevost Assistant General Counsel

cc & documents to:

Ross M. Madden, Director Region 13, N.L.R.B. 881 U. S. Courthouse & F. O. B. 219 South Dearborn Street Chicago, Illinois 60604

Quarles, Herriott & Clemons Att: John G. Kamps & James Urdan, Esqs. 411 East Mason Street Milwaukee, Wisconsin 53202

Joseph L. Rauh, Jr. 1625 K Street, N.W. Washington, D. C. (6)

Stephen I. Schlossberg 8000 East Jefferson Avenue Detroit, Michigan 48214

Harold A. Katz 7 South Dearborn Street Chicago, Illinois 60603 For the Seventh Circuit 219 South Dearborn Street Chicago, Illinois 60604

Kenneth J. Carrick Clerk

April 8, 1968

Mr. James Urdan Attorney at Law 411 East Mason Street Milwaukee, Wisconsin

> Re: Russell Scofield, et al. v. National Labor Relations Board, No. 14698

Dear Mr. Urdan:

The National Labor Relations Board has submitted a draft of a decree, which they suggest is in conformity with this Court's opinion in the above entitled cause.

Enclosed is the draft decree, which you may approve as to form in writing on the draft and returning it to me for presentation to the Court. If you believe that it is not in conformity with the Court's opinion, you may return the draft to me with an original and four copies of your suggestions in opposition by Thesday, April 16, 1968.

Very truly yours,

Kenneth J. Carrick, Clerk

KJC: hm Enc. United States Court of Appeals
For the Seventh District
219 South Dearborn Street
Chicago, Illinois 60604

Kenneth J. Carrick Clerk

April 16, 1968

National Labor Relations Board Washington, D. C.

James Urdan, Esq. 411 E. Mason Street Milwaukee, Wisconsin

Marcel Mallet-Prevost
Assistant General Counsel
National Labor Relations Board
Washington, D. C.

Joseph L. Rauh, Jr., Esq. 1625 K Street, N.W. Washington, D. C.

Harold A. Katz, Esq. 7 So. Dearborn Street Chicago, Illinois

Philip L. Padden, Esq. 606 W. Wisconsin Avenue Milwaukee, Wisconsin

Re: Russell Scofield, et al., Petitioners v. National Labor Relations Board, Respondent

International Union, United Automomobilé, Aerospace and Agricultural Implement Workers of America, AFL-CIO, Intervenors

No. 14698

Gentlemen:

Enclosed is certified copy of the final decree entered by this Court on April 16, 1968, in the above entitled cause.

Very truly yours, Kenneth J. Carrick, Clerk

DECREE

IN THE

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

RUSSELL SCOFIELD, LAWRENCE HANSEN, EMIL STEFANEC, GEORGE KOZBIEL,

Petitioners.

April 16, 1968

NATIONAL LABOR RELATIONS BOARD,

No. 14,698

Respondent.

AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, AFL-CIO, Intervenors.

Before KNOCH, Senior Circuit Judge, and SWYGERT and CUMMINGS, Circuit Judges.

THIS CAUSE came on before the Court upon a petition to review and set aside an order of the National Labor Relations Board, dated January 17, 1964, dismissing a complaint against Local 283, United Automobile, Aircraft and Agricultural Implement Workers of America, UAW-AFL-CIO, in Board Case No. 13-CB-1059-1, 13-CB-1059-2, 13-CB-1059-3 and 13-CB-1059-4. The Court heard argument of respective counsel on January 17, 1968, and has considered the briefs and transcript of record filed in this cause. On March 5,

1968, the Court being fully advised in the premises handed down its opinion denying the petition to review. In conformity therewith it is

ORDERED, ADJUDGED AND DECREED by the United States Court of Appeals for the Seventh Circuit that the petition to review an order of the National Labor Relations Board dated January 17, 1964, dismissing a complaint against Local 283, United Automobile, Aircraft and Agricultural Implement Workers of America, UAW-AFL-CPO, in the above matter, be and it hereby is denied.

WIN G. KNOCH

Judge, United States Court of Appeals
for the Seventh Circuit

LUTHER M. SWYGERT

Judge, United States Court of Appeals

for the Seventh Circuit

WALTER J. CUMMINGS
Judge, United States Court of Appeals
for the Seventh Circuit

A True Copy: Teste:

KENNETH, J. CARRICK Clerk of the United States Court of Appeals for the Seventh Circuit.

SUPREME COURT OF THE UNITED STATES

No. 273, October Term, 1968:

RUSSELL SCOFIELD, et al., Petitioners,

NATIONAL LABOR RELATIONS BOARD, et al.

ORDER ALLOWING CERTIORARI. Filed October 14, 1968.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit is granted, reserving for decision, after argument, the question of whether the petition for writ of certiorari was timely filed. The case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.



SUPREME COURT, U. B.

FILED

JUL 6 1968

JOHN & DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1968

 $N_0 = 27.3$

RUSSELL SCOFIELD, LAWRENCE HANSEN, EMIL STEFANEC, and GEORGE KOZBIEL, Petitioners,

25.

NATIONAL LABOR RELATIONS BOARD and INTERNATIONAL UNION, UAW-AFL-CIO, Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

JAMES URDAN,
Attorney for Petitioners
411 E. Mason Street
Milwaukee, Wisconsin 53202



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IN THE

SUPREME COURT OF THE UNITED STATES.

October Term, 1968

No. -

RUSSELL SCOFIELD, LAWRENCE HANSEN, EMIL STEFANEC, and GEORGE KOZBIEL, Petitioners,

NATIONAL LABOR RELATIONS BOARD and INTERNATIONAL UNION, UAW-AFL-CIO, Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF, APPEALS FOR THE SEVENTH CIRCUIT

Rusself Scofield, Lawrence Hansen, Emil Stefanec and George Kozbiel petition for a writ of certiorari to review the decree of the United States Court of Appeals for the Seventh Circuit entered in this case on April 16, 1968. (App. p. 1a)

OPINIONS BELOW

The opinion of the Court of Appeals (App. p. 3a) is reported at 67 LRRM 2673, 57 CCH-Labor Cases

T12,531. The decision and order of the Board (App. p. 14a) are reported at 145 NLRB 1097. This case was previously before this court with respect to the issue of the right of the union to intervene in the proceedings before the Court of Appeals. The opinion on that issue is reported at 382 U.S. 205. That issue is not involved in the present petition.

JURISDICTION

The decree of the Court of Appeals was entered on April 16, 1968. The jurisdiction of this court is invoked under 28 USC 1254(1) and §10(e) of the National Labor Relations Act, as amended, 29 USC §160(e).

QUESTION PRESENTED

Whether a union restrains or coerces an employee in the exercise of a right guaranteed by Section 7 of the National Labor Relations Act, in violation of Section 8(b)(1)(A) of the Act, when the union fines an employee, and attempts to collect such fine by court action, because the employee performed work and earned wages in excess of certain production quotas established and enforced by the union.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act (61 Stat. 136, 29 USC 151, et seq.) are as follows:

"Section 7. Employees shall have the right to selforganization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities..."

"Section 8(b). It shall be an unfair labor practice for a labor organization or its agents.—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in Section 7: Provided, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein..."

STATEMENT OF THE CASE

The facts are fully set forth in the decision of the Board (App. p. 14a). The essential facts are few and undisputed.

The union has been the collective bargaining representative of the employees of Wisconsin Motor Corporation in Milwaukee, Wisconsin since 1937. Under the collective bargaining agreement in force at the time this dispute arose, employees of the company were required either to belong to the union or to pay the union a service fee equivalent to dues.

For a number of years the union has had in effect a rule which required union members to limit their production so that their earnings of incentive pay would not exceed certain specified ceilings. The ceilings were the subject of collective bargaining between the company and the union from time to time. Although the company knew of the existence of the ceilings and attempted to have them raised or eliminated, the company did not recognize the ceilings as a limit on the amount which an employee could earn. If an employee chose to ignore the ceilings and produce and report work in excess of the ceilings,

the company paid the employee for his actual production without regard to the ceilings.1

The union enforced the ceiling rule by imposing fines on members. Ordinarily the fines were limited to one dollar for each violation. However, persistent violations subjected an employee to a charge of conduct unbecoming a union member with consequent exposure to fines up to \$100 for each offense. The petitioners here were charged with conduct unbecoming a union member for having violated the ceiling rule, and following union trials, fines ranging from \$50 to \$100 were imposed. The union has instituted civil actions in the Wisconsin courts for the collection of such fines, which actions are still pending.

The petitioners here filed charges with the National Labor Relations Board alleging that the union action in imposing and attempting to collect fines for violation of the ceiling rule restrained and coerced the petitioners in the exercise of their right under Section 7 of the National Labor Relations Act² to refrain from concerted union activities. A complaint was issued by the General Counsel of the Board alleging that such action by the union constituted an unfair labor practice under Section 8(b)

The practical effect of the ceiling rule was elaborated in the opinion of Board member Leedoms

[&]quot;The Employer has placed no limits on the employees' production or earnings and has vigorously opposed such a limitation, but without success. The Company is in a highly competitive market, and the increased costs resulting from the Union's production ceilings have caused a decline in its competitive position. The record shows that the Union's production ceilings have reduced and slowed down production, that an employee can reach the production ceiling in 5 hours, and that the employees have read books, played cards, and talked in the remaining time." 145 NLRB 1097 at 1106 (App. p. 28a)

²Hereinafter referred to as the Act.

(1) (A) of the Act. The Board dismissed such complaint, finding that no unfair labor practices had been committed. (App. p. 25a)

Pursuant to Section 10(f) of the Act, the petitioners here petitioned the Seventh Circuit Court of Appeals for review of the decision and order of the Board. Consideration of the merits of the petition was delayed in the Court of Appeals pending the review by this Court of the right of the union to intervene as a party in the proceedings before the Court of Appeals. Thereafter proceedings were further deferred pending the consideration by this Court of related issues which were ultimately resolved in the case of National Labor Relations Board v. Allis-Chalmers Manufacturing Co., 388 U.S. 175. Following that decision the Court of Appeals renewed consideration of the petition for review in the present case and ultimately by a divided court denied the petition. (App. p. 2a)

REASONS FOR GRANTING THE WRIT

In the Allis-Chalmers case, 388 U.S. 175, this Court held that there was no violation of Section 8(b) (1) (A) of the Act where a union imposed fines of \$100 or less against employees for crossing the union picket lines and working during a strike. This Court was closely divided in that case with a majority of four justices, a concurring opinion by Mr. Justice White, and a vigorous dissent joined in by four justices.

The court below has now misconstrued the Allis-Chalmers decision and applied it far more broadly than its proper limits. Contrary to the clear statutory language and the supporting legislative history; the court has granted a broad immunity to union fines which in no way involve the special policy considerations relied upon by the majority in the Allis-Chalmers decision.

The decision below is in conflict with the approach taken by the Court of Appeals for the Ninth Circuit in the case of Associated Home Builders of the Greater East Bay v. NLRB, 352 Fed. 2d 745. As recognized by the court in that case, the question of union production limitations involves issues and policies which differ importantly from the simple question of the legality of union fines.

As will be further elaborated below, it is essential that this Court grant review here. The present case presents an ideal vehicle for this Court to further elucidate this important area in the administration of the Act and to provide necessary guidelines for the resolution of the numerous cases involving union fine issues which are now pending before the NLRB and the courts.

1. The decision below upholds the validity of a coercive union device for restricting the productive output of an individual employee. Although the individual is willing to work in accordance with his abilities and the employer is willing to pay him for whatever work he produces, the union fine effectively inhibits the employee from earning the money the employer is willing to pay. Such a restraint upon production has broad implications, affecting not only the legal issues in application of the Act but more importantly, the critical economic question of the productivity of American industry.

In recent years the question of the productivity of the individual worker has become a central focus of national economic planning. This concept has been prominent in the analysis of the causes and control of inflation and the establishment of national guidelines governing wage decisions. In this context, the approval or even tolerance of coercive union fine tactics to limit individual produc-

resolve through enforcement of the clear prohibitions of Section 8(b) (1) (A) of the Act.

It is an essential foundation of national labor policy that issues of wages, work loads and productive output should be resolved through the collective bargaining process. This concept is the bedrock of the Act. Yet through the device of coercive fines, the union here effectively bypasses the collective bargaining process and enforces a production and wage limitation which it was unable to obtain in negotiations with the employer.

The decision of the Court of Appeals for the Ninth Circuit in the case of Associated Home Builders of the Greater East Bay, Inc. v. NLRB, 352 Fed. 2d 745 recognized the critical distinction between this type of case and the general issue of the legality of union fines. The court there considered union fines imposed upon employees for exceeding production quotas imposed by the union. The court gave careful consideration to the issues raised under Section 8(b) (1) (A) of the Act, but found that it was unnecessary to decide these issues. Rather, the court recognized that the union conduct in question was a serious interference with the collective bargaining process contemplated by the Act. Therefore the court remanded the case to the Board for further consideration of this aspect of the dispute. By way of contrast, the court in the present case dismissed the complaint against the union and found the union fines to be immune under the Allis-Chalmers doctrine.

³ In its argument to the Court of Appeals the union emphasized its long opposition to incentive pay systems and the claimed justifications for the ceiling rule. Such arguments are beside the point. Under the scheme of the Act, such objectives may only be sought through collective bargaining, not through coercion against the right of the individual to refrain from the union activity.

2. The decision of this court in the Allis-Chalmers case neither requires nor supports the broad immunity for union fines permitted by the Court of Appeals here. The dissenting opinion of Mr. Justice Black in the Allis-Chalmers case forcefully demonstrated that the statutory language as confirmed by the legislative history brought union fines within the prohibitions of Section 8(b)(1)(A) of the Act. The contrary opinion of the majority in that case pointed to certain overriding policies which were deemed to require approval of the particular union fines involved there. The present case involves no such special policies. In fact the union fines in the present case are in direct opposition to the policies which the court sought to further in the Allis-Chalmers decision.

The majority in Allis-Chalmers saw the union fines there as an essential support for the proper function of the union as a collective bargaining agent. By contrast, the fines here do not aid collective bargaining but rather bypass, ignore and weaken it.

The critical distinction between the Allis-Chalmers case and the pending case is the nature of the union policy sought to be enforced by the imposition of coercive union fines. In the Allis-Chalmers case that policy was a restriction against crossing a picket line and working during a strike. In the instant case the objective of the union is to require an employee to observe a union-imposed production limitation which would restrict the employee's work output and the employee's earnings. A union fine to implement such an objective clearly restrains and coerces the employee within the meaning of Section 8(b) (1) (A) of the Act in his exercise of his right under Section 7 of the Act to refrain from the union production limitations. The reach of the Allis-Chalmers decision is not so broad as to permit such coercion.

The petitioners here ask only the right to be permitted to work in accordance with their capacity and to earn the rewards that the employer must pay under the applicable collective bargaining agreement. The union on the other hand seeks to accomplish by unilateral fines what it has been unsuccessful in accomplishing through collective bargaining, namely a limitation of an employee's output and pay to fixed limits set by the union.

Unlike the Allis-Chalmers case, we are not here concerned with a traditional and central union activity, such as the strike, which was given firm and explicit protection under the Act. Rather we here see a union activity which has never found favor with the Board or the courts and which is not even protected by the Act.

Numerous decisions of the Board have held that various forms of union production restrictions are not protected activities under the Act. For example, in General Electric Co., 155 NLRB 208, the Board held that an employer did not commit an unfair labor practice when it discharged an employee for attempting to induce other employees to engage in a deliberate restriction of production under an incentive pay system. Such activity by the employee was found not to be protected under the Act.

Numerous other cases have established that the Act does not protect a variety of union techniques for slowing down or interfering with production. Representative decisions are Automobile Workers, Local 232 v. WERB, 336 U.S. 245; NLRB v. Montgomery Ward & Co., 157 F. 2d 486; Elk Lumber Co., 91 NLRB 333; Celotex Corp., 146 NLRB 48; Raleigh Water Heater Manufacturing Co., 136 NLRB 76. Moreover, the Board has specifically recognized that an employee has the protected

right under the Act to refrain from such union production restrictions. Printz Leather Company, Inc., 94 NLRB 1312.

The sharp distinction between the policies involved in the Allis-Chalmers case and the policies involved here is highlighted in the article by Professor Summers, Legal Limitations on Union Discipline, 64 Harv. L. Rev. 1049, one of the principal authorities relied upon by Mr. Justice Brennan in his Allis-Chalmers opinion. That article reviews the existing precedents with regard to various reasons for union discipline and points out that while discipline for strike-breaking is universally recognized, discipline relating to production restrictions has not been enforced by the courts. See 64 Harv. L. Rev. 1049, 1065. An observation of great force here can be found in the case of Dragwa v. Federal Labor Union No. 23070, 41 Atl. 2d 32, 34:

"... if a voluntary trade organization should ordain that a member who in the pursuit of his occupation exceeds the average level of industry and production of his fellow workers, shall be expelled for conduct unbecoming a member, I would experience no hesitancy in invalidating such a regulation as positively repugnant and inimical to our traditional public policy. The freedom of an individual to excel in any field of lawful activity is one of our national ideals and a substantial right which the individual may not himself barter away."

In the Allis-Chalmers case this Court permitted a union fine which it deemed to be in furtherance of the proper role of the union as a collective bargaining agent and the exercise of the traditional union strike power. The principle of that case must not be extended to permit fines in furtherance of other union policies which do not further the purposes of the Act. Here the union

seeks to utilize the fine as a device to achieve a production restriction it was unable to achieve through collective bargaining and to limit the protected right of an individual to work and earn to his full capacity. Such action by the union constitutes an unfair labor practice under the express language of the Act and nothing in the interpretation of the Act in the Allis-Chalmers case requires a contrary conclusion.

3. The extent to which Section 8(b)(1)(A) of the Act limits union disciplinary sanctions is affimportant and recurring question of interpretation under the Act. The Allis-Chalmers decision established one guidepost. More, recently the Allis-Chalmers approach was distinguished when this Court ruled that Section 8(b) (1) (A) of the Act was violated by a union which expelled a member for failing to exhaust intra-union grievance procedures prior to filing a charge with the NLRB on a matter that touched an area covered by the Act. National Labor Relations Board v. Industrial Union of Marine & Shipbuilding Workers of America, AFL-CIO, 68 LRRM 2257. These two decisions can be harmonized only on the theory that legality of union discipline under Section 8(b) (1) (A) is dependent upon a balancing of the particular policies and interests involved.

In this context further elucidation of the limited rationale of the Allis-Chalmers decision is essential. In the absence of such clarification substantial injustice is likely to result not only in proceedings before the Board and the Appellate Courts involving union fine matters but also in state court actions where unions seek to collect such fines from the individual employees.

The decision of the court below represents an erroneous reading of the Allis-Chalmers decision as a blanket immunity for union fines. Similarly, in state court collection actions the decision has been interpreted not only as validating the fine but as requiring state court enforcement of the fine regardless of any contrary state policies. See Local 248, UAW-AFL-CIO v. Natzke, 36 Wis. 2d 237, 153 N.W. 2d 602.

In the present state of the law, an individual employee who is wronged by a union fine and seeks to prevent court collection of the fine is faced with an almost impossible burden. In order to obtain relief on the federal level he must first convince the General Counsel of the NLRB that he has a meritorious case and then pursue the case through successive appeals to this Court. In the alternative if he wishes to contest the fine in the state system, he must pursue the various fruitless appeals through the highest state court and then hope to obtain relief through review by this Court. It will be a rare individual who can muster the resources and the patience for such a contest.

Because of these severe practical difficulties faced by an individual employee seeking to resist a fine of this nature, it is essential that this Court provide the maximum possible guidance to the NLRB and the state and federal courts to assure that just and proper decisions in accord with the Act are reached at the lowest practicable level. The present case presents an ideal vehicle for clarifying the limited scope of the Allis-Chalmers decision and preventing the Board and lower courts from improperly construing that decision as a blanket endorsement of union fines.

CONCLUSION

The question whether Section 8(b) (1) (A) bars a union from fining its members for violation of union rules is an important and recurrent one in the administration of the Act. To prevent further overly broad application of the Allis-Chalmers doctrine, the present case should be reviewed and reversed. The petition for certiorari should therefore be granted.

JAMES URDAN,

Attorney for Petitioners

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Milwaukee, Wisconsin 53202



APPENDIX

DECREE

IN THE

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

RUSSELL SCOFIELD, LAWRENCE HANSEN, EMIL STEFANEC, GEORGE KOZBIEL,

APRIL 16, 1968

No. 14,698

NATIONAL LABOR RELATIONS BOARD,

Respondent.

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, AFL-CIO, Intervenors.

Before KNOCH, Senior Circuit Judge, and SWYGERT and CUMMINGS, Circuit Judges.

THIS CAUSE came on before the Court upon a petition to review and set aside an order of the National Labor Relations Board, dated January 17, 1964, dismissing a complaint against Local 283, United Automobile, Aircraft and Agricultural Implement Workers of America, UAW-AFL-CIO, in Board Case No. 13-CB-1059-1, 13-CB-1059-2, 13-CB-1059-3 and 13-CB-1059-4. The Court heard argument of respective counsel on January 17, 1968, and has considered the briefs and transcript of record filed in this cause. On March 5, 1968, the Court being fully advised in the premises handed down its opinion denying the petition to review. In conformity therewith it is

ORDERED, ADJUDGED AND DECREED by the United States Court of Appeals for the Seventh Circuit that the petition to review an order of the National Labor Relations Board dated January 17, 1964, dismissing a complaint against Local 283, United Automobile, Aircraft and Agricultural Implement Workers of America, UAW-AFL-CIO, in the above matter, be and it hereby is denied.

WIN G. KNOCH
Judge, United States Court of Appeals
for the Seventh Circuit

LUTHER M. SWYGERT
Judge, United States Court of Appeals
for the Seventh Circuit

WALTER J. CUMMINGS
Judge, United States Court of Appeals
for the Seventh Circuit

A True Copy: Teste:

KENNETH J. CARRICK Clerk of the United States. Court of Appeals for the Seventh Circuit.

OPINION OF THE COURT OF APPEALS

Before KNOCH, Senior Circuit Judge, and SWYGERT and CUMMINGS, Circuit Judges.

CUMMINGS, Circuit Judge. Petitioners, four employees of Wisconsin Motor Corporation ("the Company"), ask us to set aside an order of the National Labor Relations Board dismissing an unfair labor practice complaint that had issued upon their charges against their Union.¹

Petitioners are members of a Union that has been the bargaining representative of the production employees of the Company since 1937. The collective bargaining contract requires such employees to belong to the Union or to pay it a service fee equivalent to dues. The Company is based in West Allis, Wisconsin, where it manufactures motors. Half of its 850 production employees, including these petitioners, are compensated on a basis permitting them to earn amounts above their basic hourly wages by producing at a rate in excess of established hourly norms of output.

In 1944, the Union membership adopted a resolution providing in substance that "the men turn in [report for payment] no more than 10 cents per hour over and above the new machine rates." In 1946, the membership approved fines as penalties for violation of that ceiling rule. The penalties are presently contained in a February 1961 Union by-law which provides that any member violating the production ceilings is "guilty of conduct unbecoming a Union member" and subject to a fine of \$1.00 for each violation. The by-law also provides that

¹Local 283, United Automobile, Aircraft and Agricultural Implement Workers of America, UAW-AFL CIO. The parent Union is an intervenor.

in case of persistent ceiling violations, the offender would be charged with "conduct unbecoming a Union member." If a member were found guilty of such conduct, he could be assessed with a maximum fine of \$100 (enforceable within a specified time by automatic suspension or expulsion) or suspended or expelled from membership. The Union's sanctions do not impair a member's status as an employee of the Company.

Ceilings were established from time to time through collective bargaining between the Company and the Union although the Company did not agree to limit wages accordingly. Thus if an employee produced work in excess of the ceilings, the Company would on request pay him for his actual production without regard to the ceilings. So far the Company has been unsuccessful in its bargaining for the elimination of the Union ceiling rates, but the ceilings on all piecework jobs were increased in July of 1953 and August 1956. The ceilings in effect at the time of this dispute were between 45 and 50 cents above the machine rates.

By Union rule, any production which a production employee member has turned out at a pace which would yield hourly rates above the ceiling rates is not to be reported to the Company for immediate compensation. Instead, such members are required to "bank" with the Company their earnings in excess of ceilings. On occasions when they receive less than ceilings (for example, through absence or enforced idleness), the Union permits the members to draw upon their "bank" by charging the Company for work previously produced but not reported for wage purposes. Although the Company normally acquiesces in the "banking" system, if an employee chooses to disregard the Union rule and report all production for immediate payment, the Company,

as noted, will pay him even though the Union ceilings are exceeded.

In 1946, the Union first began enforcing its "banking" system by imposing fines. In 1961, the Union found that six members had violated the "banking" system by reporting to the Company for immediate payment production at a rate in excess of the Union ceilings. Two members were fined \$35 each and paid their fines. Two of the petitioner members were fined \$100 each, the third was fined \$75, and the fourth was fined \$50. Instead of paying their fines, the four petitioners filed unfair labor. practice charges with the Regional Director of the National Labor Relations Board in May 1961. In October 1961, the Union filed a suit to collect the fines in the Civil Court of Milwaukee County, Wisconsin, where it is still pending. In December 1961, the General Counsel of the Board issued a complaint charging that the Union, in fining and suing petitioners, had restrained and coerced them in the exercise of their rights under Section 7 of the National Labor Relations Act and thereby violated Section 8(b) (1) (A) of the Act. The Union and Company have taken no measures to impair the job status of the petitioners.

Section 7 grants employees the right to refrain from concerted activities. It provides in pertinent part (29 U.S.C. § 157):

[&]quot;Employees shall have the right to " engage in " " concerted activities " , and shall also have the right to refrain from any or all of such activities " "."

⁸ Section 8(b)(1)(A) provides in pertinent part (29 U.S.C. § 158 (b)(1)(A)):

[&]quot;(b) It shall be an unfair labor practice for a labor organization or its agents —

[&]quot;(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: Provided, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein • • •."

The Trial Examiner and the Board concluded that Section 8(b) (1) (A) had not been violated and dismissed the complaint. In view of the authoritative construction of that Section in National Labor Relations Board v. Allis-Chalmers Mfg. Co., 388 U.S. 175, we must deny the employees' petition for review.

As early as 1951, this Court construed the proviso in Section 8(b) (1) (A) in American Newspaper Publishers Association v. National Labor Relations Board, 193 F.2d 782 (7th Cir. 1951), affirmed on other grounds 345 U.S. 100. There the union threatened to expel members for violation of a rule forbidding them to work in a shop with non-members. Even though the expulsion might involve the loss by the employee of his job and other economic benefits such as pension and mortuary provisions, we held (at pp. 800-801, 806):

"Under this limitation [proviso] Congress left labor organizations free to adopt any rules they desired governing membership in their organizations. Members could be expelled for any reason and in any manner prescribed by the organization's rules, so far as § 8(b)(1)(A) is concerned. This interpretation has support in the legislative history of the Act. It is also significant that while the Board has been so interpreting this section of the Act during the past four years, Congress has not amended the section to indicate that a broader interpretation of the section was intended or desired. It is not within the power of the courts to write into this section of the Act, by interpretation, language which would broaden its scope.

[&]quot;• • the proviso in § 8(b)(1)(A) permits unions to enforce their internal policies upon their membership as they see fit."

In National Labor Relations Board v. Amalgamated Local 286, 222 F.2d 95 (7th Cir. 1955), the union threatened to deprive certain members of group and hospitalization insurance coverage because they had refused to pay various disciplinary assessments and fines which the Union had imposed upon them. Following the lead of American Newspaper Publishers Association, the Court held that under the proviso in Section 8(b)(1)(A) the union's threatened withdrawal of the insurance rights of the complaining employees as a disciplinary measure was in full conformity with its right to regulate its internal affairs.

Thus in this Circuit, even before the decision in National Labor Relations Board v. Allis-Chalmers Mfg. Co., 388 U.S. 175, great breadth was accorded to the proviso in Section 8(b) (1) (A). In Allis-Chalmers, the opinion of the Court holds that the words "restrain or coerce" used in Section 8(b)(1), as shown by the legislative history of the Section, were not meant to encompass internal affairs of unions. In other words, internal union disciplines are not among the proscribed restraints. In reaching this conclusion, the Court was partly motivated by our national labor policy that clothes a union with powers analogous to a legislature, with union rules enacted by the majority becoming binding on the minority. The Court noted that in the case of a strong union, expulsion from membership is a far more severe penalty than a reasonable fine (at p. 183).4 The Court's examination of the legislative history of Section 8(b) (1) (A) convinced it that the statute does not prohibit union imposition of disciplinary fines and suits to collect them. In reaching its conclusion that the

See also Cox, "The Role of Law in Preserving Union Democracy," 72 Harv. L. Rev. 609, 612, 622-623 (1959)

body of Section 8(b) (1) (A) was inapplicable to fines and collection suits aimed at union members crossing picket lines and working during lawful strikes, the Court found cogent support in the proviso to Section 8(b) (1), stating (at pp. 191-192):

"At the very least it can be said that the proviso preserves the rights of unions to impose fines, as a lesser penalty than expulsion, and to impose fines which carry the explicit or implicit threat of expulsion for nonpayment. Therefore, under the proviso the rule in the UAW constitution governing fines is valid and the fines themselves and expulsion for non payment would not be an unfair labor practice."

The Court found it unnecessary to decide whether Section 8(b(1)(A) "proscribes arbitrary imposition of fines, or punishment for disobedience of a fiat of a union leader" (at p. 195).

In his concurring opinion, Mr. Justice White relied more on the proviso to Section 8(b)(1)(A) than on legislative history showing the inapplicability of the "restrain or coerce" language of the body of the Section. In joining in the opinion of the Court, he noted that there might be some internal union rules "which on their face are wholly invalid and unenforceable" (at p. 198).

Union opposition to piecework has a history in the labor union movement dating at least back to 1908. Fines and expulsion of members for violating the present and antecedent ceilings have been the rule for 22 years. We are told that the work of a majority of these employ-

⁸ It should be noted that the amounts of the instant fines are reasonable, so that there is no need to read Section 8(b)(1) as barring court enforcement of them. We need not consider whether excessive fines would be proscribed by that Section.

See Slichter, Union Policies and Industrial Management (1941), pp. 285-286.

ees would be jeopardized by younger, more energetic employees, and that the rule is therefore intended to protect the well being of all members, for if the younger employees received higher pay by increased production, the older members, unable to turn out similar piecework quantities, would be demoralized and even face lay-offs. As the Trial Examiner pointed out, ceiling rules derive from a legitimate, traditional interest in union objectives. They reflect fears of (1) employees working themselves out of jobs by overproduction; (2) the establishment of a new productive norm lowering the piecework rate and the compensation for actual production; (3) morale-threatening jealousies and (4) health problems caused by too much pressure. These factors were covered in some detail in the excerpts from various labor authorities appended to his report (145 NLRB at pp. 1138-1141. One such authority explained the purpose of ceiling limits as follows:

"At their inception the purpose of limits applying to pieceworkers is not primarily to make work but partly to protect the union from being weakened by jealousies and dissensions arising from the fact that some workers receive better jobs than others, partly to prevent foremen from playing favorites in assigning jobs, and partly to prevent employers from cutting liberal piece rates or from using the high earnings of some workers as an argument against a general increase in piece rates. Such limits have in the past been common among the glass bottle blowers, the flint glass workers, the potters, the stove molders, and in 1940 are being imposed by the leather workers in Massachusetts."

⁷ Slichter, op. cit., pp. 166-167; see also pp. 296-305.

Thus the rule has a rational basis, and we cannot say that it was not reasonably calculated to achieve a permissible end. Accepting the Allis-Chalmers stricture that in considering questions of union discipline a union is comparable to a legislature, our function is to determine whether these fines conform to policies formulated by the Union and not violative of its constitution or of federal law. Since the Ind here was a legitimate union objective and the means were appropriate to enforce it, our hand should be stayed. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 420. Enough has been said to show that the Union's imposition of these fines was not arbitrary and that the rules themselves are grounded on a long-standing policy and cannot be deemed invalid or unenforceable on their face.

Peritioners argue that the present rule circumvents the bargaining process, and that the Union should have to obtain a provision against incentive pay through collective bargaining with the Company. Since petitioners concede that the Union can validly impose ceilings through collective bargaining, it is no great departure to allow them to be imposed by a disciplinary rule enforcing ceilings already established by collective bargaining. If a union has validly established a policy against overproduction, it must have the concomitant power to discipline members who violate ceilings. Cf. Summers, "Legal Limitations on Union Discipline," 64 Harv. L. Rev. 1049 (1951). Discipline has been described by the same author as the criminal law of union government. "The Law of Union Discipline: What the Courts Do in Fact," 70 Yale L.J. 175, 178 (1960).

As the intervenor pointed out, the rule enforced in Allis-Chalmers was of more serious economic conse-

^{*}Summers, "Legal Limitations on Union Discipline," 64 Harv. L. Rev. 1049, 1073-1074 (1951).

work during that strike and their jobs might be forfeited. Here the employees were permitted to work even in excess of ceilings, with the additional earnings deferred under the Union's "banking" system. Their job rights were unaffected by the rule. Petitioners assert that "banking" involves a very small amount of the Company's production and does not overcome the Union's limitation on production, but under Section 8(b) (1)-(A) of the Act, as interpreted in Allis-Chalmers, the Union rule would survive even if there were no provision to "bank" excess earnings.

Petitioners depend principally on Allen Bradley Company v. National Labor Relations Board, 286 F.2d 442 (7th Cir. 1961). There the question was whether the union was obliged to bargain in good faith over a collective bargaining contract provision proposed by the employer limiting the union's right to discipline or fine its members. The holding was that the proposals made by the company were a proper subject for collective bargaining. The question for resolution by this Court was not whether union discipline of members violates Section 8(b)(1)(A). Furthermore, in that case, Judge Major stated (at p. 446):

"Coercive action, whether by way of fine, discharge or otherwise, which deprives a member of his right to work and his employer of the benefit of his services, cannot be said to relate only to the internal affairs of the union."

In the present case, no member has been deprived of his right to work nor has the employer been deprived of the benefit of a member's services. To the extent that a dictum in *Allen Bradley* disapproves union fines and collection suits aimed at members crossing the union's

picket line and continuing to work for their employer, that dictum was flatly rejected in Allis-Chalmers and is no longer viable. But as Allen Bradley still holds, the Wisconsin Motor Corporation can require the Union to bargain over a demand to give up its ceiling rule.

Petitioners rely on Printz Leather Co.: Inc., 94 NLRB 1312 (1951), where the union threatened to strike if the employer did not discharge an employee who the union felt was working too fast. Printz is inapplicable because there the union's objective (unilateral imposition of production ceilings) and methods (threats to force the employer to discharge the employee) were manifestly improper. Associated Home Builders of Greater East Bay, Inc. v. National Labor Relations Board, 352 F.2d 745, 751-752 (9th Cir. 1965); National Labor Relations Board v. Brotherhood of Painters, 242 F.2d 477, 480-481 (10th Cir. 1957). They also rely on Charles S. Skura, 148 NLRB 679, 683 (1964), which held that the union violated Section 8(b) (1) (A) by fining an employee-member for filing an unfair labor practice charge against the union without first exhausting internal union remedies. The Board held that the union's objective was at odds with policy considerations because "'no private organization should be permitted to restriet any person's access to courts of justice'". No policy considerations of comparable strength militate against the Union rule here at issue.

The petition for review is denied.

This question is now awaiting argument in the Supreme Court in Industrial Union v. National Labor Relations Board, No. 796, present Term. No view is expressed herein as to the correctness of the Skura rule.

No. 14698

KNOCH, Senior Circuit Judge. (dissenting) I think we are in error in concluding that Allis-Chalmers is dispositive of the case before us, and that there is a difference here only of degree and not of kind. The forceful dissent of the four Justices in Allis-Chalmers and the limited concurrence of Mr. Justice White seem to me to dictate a very cautious application of the principle of that case to other cases (such as this one) which involve no impairment of the collective bargaining power and its concomitant strike weapon. I fear that the majority have unduly extended the scope of Allis-Chalmers. In my opinion the coercive fines here imposed constituted an unfair labor practice, and the Board's dismissal of the complaint herein should be reversed.

DECISION AND ORDER OF NATIONAL LABOR RELATIONS BOARD

On June 7, 1962, Trial Examiner A. Norman Somers issued his Intermediate Report in the above-entitled proceeding finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint and recommending that the complaint be dismissed, as set forth in the Intermediate Report attached hereto. Thereafter, the General Counsel and the Charging Parties filed exceptions to the Intermediate Report and briefs in support of their exceptions.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the exceptions, and briefs and the entire record in the case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner with the following additions.

The facts in this case are fully set forth in the Intermediate Report and will only briefly be touched upon here.

The Respondent Union, whose membership is restricted to employees of the Company, has been the bargaining representative of the Company's employees since 1937. Its present contract, like earlier ones, contains a union-security clause which provides that employees have the option of either joining and maintaining good standing in the Union, or rejecting membership but paying the Union a "service fee."

During the past 25 years there has been in effect a union rule, revised from time to time, setting produc-

tion ceilings on piece work, or, more accurately, limiting the amount of incentive pay a member may earn. As declared in the union bylaw, the rule is designed to implement the Union's "basic object . . . to protect members . . . in their employment and to give them as much security as the industry can provide." In operation, the ceilings, in each of the five labor grades, impose a limitation on the amount a member may earn over the machine rate, the minimum contract rate for that job classification. At present the ceilings are set at between 45 and 50 cents per hour over the machine rate. The union does not require that the member cease production when he has attained the ceiling rate for the day; he may continue working, but, in order to comply with the rule, he must not report, for credit toward his earnings, any items produced in excess of the amount permitted to be earned under the production quotas. He must, by a bookkeeping entry, "bank" this production for later payment. An employee may draw on his "bank" when for one reason or another he fails to earn the basic machine rate or even the lower "day rate." This may occur, for example, when he is sick and unable to work, or his machine is out of order. The Company itself, however, places no limitations on an employee's earnings. It will, if he so desires, pay him immediately for all production which he reports.

Members who violate production ceilings are subject to a fine of \$1 for each violation, but persistent violators may be subject to a charge of conduct unbecoming a member, in which event a fine of \$100 or a lesser amount may be imposed and a member suspended. A member who pays a fine may also be expelled. It is undisputed,

¹ Approximately half of the Company's 800 or more employees work under an incentive pay plan.

however, that the Union's sanctions to enforce the rule may not be extended to impair a member's status as an employee. The rule of course has no application to nonmembers who may be employees of the Company.

The rule limiting incentive pay is not incorporated in the contract as a term of employment. Although the Company does not consider itself bound by the rule, and at various times during negotiations has unsuccessfully sought to induce the Union to drop the ceilings, the Company nevertheless as a practical matter has accepted the ceilings as an integral part of the modus operandi and has recognized the ceilings as forming an important element of its negotiated wage structure. So far as appears, the Company has never sought to discipline any of its employees for adherence to the Union's ceiling restrictions. The Company uses the ceilings in computing wages and evaluating jobs. Ceilings have also played an important role in the negotiation of collective-bargaining agreements between the Company and the Union. Thus, in 1953, one of the Company's proposals was that the ceilings be increased at least 10 percent. The contract that year made provisions for a 13 cents per hour increase in ceilings. The 1956 strike settlement agreement provided for another increase in ceilings. In 1959, the Company made no request for the elimination of ceilings, but only requested that they be increased 10 cents.

Moreover, while abstaining itself from enforcing the ceiling rule, the Company voluntarily aids and cooperates with the Union in the administration of the rule. Thus, the Company joins in the "banking" procedures by making the necessary bookkeeping entries. The Company also allows the ceilings to be posted on its bulletin boards. And it assists the Union in policing enforcement

of the rule by making available to the Union the members' production records and allowing the union stewards to inspect such records on Company time without loss of pay.

At such an inspection, conducted in February 1961, the Respondent Union found that the Charging Parties had violated the rule by exceeding their production quotas. The Charging Parties are all members of the Union, who, by their decision to join, have elected to subject themselves commonly with other union members to union regulation and discipline. Following a hearing before the Union's trial board, each of the Charging Parties was found guilty of conduct unbecoming a member. Penalties were assessed against them, consisting of up to a year's suspension from membership and fines ranging from \$50 to \$100. In October 1961, the Charging Parties having failed to pay the fines, the Union brought suit in a State court to recover the amount of the fines. No evidence as to the outcome of the suit is before us. No action has been taken, or threatened, to impair the job status of the individuals involved.

The complaint alleges, and the answer denies, that the Union's action in imposing fines for breach of its production rule constituted a violation of Section 8(b)(1) (A) of the Act. That Section provides:

It shall be an unfair labor practice for a labor organization or its agents... to restrain or coerce... employees in the exercise of their rights guaranteed in Section 7, provided, that this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein.

In his full discussion of the issues, the Trial Examiner concluded, we believe correctly, that neither the legisla-

tive history of the Section nor the body of the law dealing with and interpretating the Section since its enactment in 1947 as part of the Labor-Management Relations Act (the Taft-Hartley law) supports the view that Section 8(b)(1)(A) was intended to interdict the conduct under examination.

The General Counsel argues for a different reading of the legislative history, one that would give a broader interpretation to the language of the Section; he urges that the imposition of a fine constitutes restraint and coercion within the meaning of Section 8(b)(1)(A). Essentially, it is the General Counsel's position that the legislative purpose in enacting Section 8(b)(1)(A) was to protect the freedom of the individual workman from duress by the union as well as by the employer, and that it was the intent of Congress "to impose upon unions the same restrictions which the Wagner Act imposes upon employers with respect to violations of employee rights." While there may have been such a general legislative purpose, this is not to say that Congress did not place certain limitations on that purpose. For one thing, the legislative history of Section 8(b)(1)(A) points to a Congressional intent to reach only certain limited conduct on the part of labor organizations. Thus, the Supreme Court in Curtis Brothers,3 in commenting on the tenor of the expressions which preceded the Senate debate as to the Section's purpose, observed that "the note repeatedly sounded there is as to the necessity for protecting individual workers from union organizational tactics tinged with violence, duress or reprisal." The Conference Report makes it evident that the Section was

hard Altman), 366 U.S. 731, 738.

N.L.R.B. v. Drivers, Chauffeurs, and Helpers, Local 639 (Curtis Brothers), 362 U.S. 274.

so understood by the House. The House accepted the Senate bill as covering the same ground as its own proposed Section 12(a)(1), a Section which would have made unlawful the use of force, violence, physical obstruction or threats thereof to accomplish certain purposes associated with organizational activity and strikes.

If, as the General Counsel contends, the decision in Bernhard Altman suggests a broader reach of Section 8(b) (1) (A), it is nonetheless evident that internal union disciplines were not among the restraints intended to be encompassed by the Section. Thus, as the Trial Examiner points out, when the introduction of Section 8(b) (1) (A) touched off expressions of apprehension that its language could be construed as interfering with the internal affairs of unions, Senator Taft, even before the proviso to the Section was introduced, affirmed that the sponsors had no intention to interfere with a union's internal affairs. The same opinion was voiced by Senator Ball on the introduction of the proviso. On that occasion he stated, "I merely wish to state to the Senate that the amendment offered by the Senator from Florida is perfectly agreeable to me. It was never the intent of the sponsors of the amendment to interfere with the internal affairs or organization of unions. The amendment of the Senator from Florida makes that perfectly clear." At a later point in the Senate consideration of the bill

⁴ I Legislative History 546.

⁶ I Legislative History 204-205.

^{6 122} NLRB 1289, affirmed International Ladies', Garment Workers' Union, AFL-CIO v. N.L.R.B. (Bernhard-Altman) 366 U.S. 731. In that case the Court upheld the Board's finding that the execution of a collective-bargaining agreement with a minority union whereby that union is recognized as the exclusive bargaining representative of all employees in the unit, restrained and coerced employees in that unit, and that this restraint and coercion was practiced both by the company and the union.

Senator Ball stressed the limited scope of the prohibitory part of the Section when he explained that the proviso:

... is designed to make it clear that we are not trying to interfere with the internal affairs of a union which is already organized. All we are trying to cover is the coercive and restraining acts of the union in its efforts to organize unorganized employees.

The expressed disavowals of the sponsors, and other legislative facts marshalled by the Trial Examiner, make clear that Section 8(b)(1)(A) was not intended to reach the conduct here involved, even without regard to the purpose of the proviso, because, as is pointed out, it was not the kind of activity with which Section 8(b) (1)(A) was concerned.

Proceeding from the premise that the prohibitory part of 8(b)(1)(A) was applicable to the type of conduct here involved, the General Counsel contends further that such conduct is not protected by the proviso to the Section. He concedes, however, that even though a fine be deemed coercive, it nevertheless would not violate Section 8(b)(1)(A) if the fine were merely an incident to "the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership." But because in this instance the fine was collectible as a debt and not by threat of expulsion only, the General Counsel argues that the fine had more than the incidental relationship which would exempt it from the reach of the Section.

We do not read the language of the proviso so narrowly. There is nothing in the legislative history which suggests that Congress intended to permit a union to expel a member for violation of a union bylaw, but not to fine him for the same infraction without expelling him;

⁷ See International Association of Machinists v. Gonzales, 356 U.S. 617.

or that it could enforce the fine by expulsion from the union but not by suing for its collection.

On the contrary, as the Trial Examiner has shown, Congress was more concerned with placing restrictions on a union's right to expel than to fine members. Thus Section 8(c) (6) of the House bill more severely limited the right of expulsion from a union than did 8(c) (5) of the same bill which dealt with limitations on a union's right to fine its members. The latter merely enjoined the use of fines as a penalty for members exercising certain basic civil rights of the kind now protected in the "Bill of Rights" portion of the Labor-Management Reporting and Disclosure Act of 1959. Neither of these provisions prohibited a union from disciplining a member for the infraction of a union rule of the type here involved. As the Trial Examiner has so aptly observed, to accept the General Counsel's attempted distinction is to conclude that, despite the express disavowals by the sponsors of Section 8(b)(1)(A) of any intent to interfere in the internal affairs of unions and despite the rejection of House attempts to do so, the result of the enactment of present Section 8(b) (1) (A) was to impose more stringent restrictions on union discipline than even those prohibited in the rejected House measures.

In other words, it is most unlikely that with knowledge of the long existing union practice of enforcing internal union policies by fine as well as by suspension and expulsion, and disavowing any intent to interfere in the internal affairs of unions, Congress intended to leave a union with no power to deal with offending union members except, as the General Counsel asserts, either by tolerating them or by expelling them from membership, a procedure that could well prove self-defeating.

In support of his construction of the proviso to Section 8(b) (1) (A), the General Counsel relies on a certain dictum of the court in the Allen Bradley case,8 which, reversing the Board, held that it was not a violation of Section 8(a) (5) and (1) of the Act for an employer to insist as a condition precedent to entering into a collective-bargaining contract that the union agree to the employer's proposal limiting the right of the union to discipline union members for refraining from participating in strikes called by the union. The Board does not acquiesce in this decision or in the dictum upon which the dissent relies. Not only is the decision contrary to the Board holding in this as well as in other cases, but it is also inconsistent with holdings of other Courts:10 and with the same court's holding in the American Newspaper Publishers' case," where the court

prive the member of his property right.")

⁸ Allen Bradley Company v. N.L.R.B., 286 F. 2d 442 (C.A. 7), setting aside 127 NLRB 44.

Minneapolis Star and Tribune Company, 109 NLRB 727, 729 ("... the imposition of a \$500 fine on Carpenter by the Respondent Union for his failure to engage in certain of its activities is not violative of Section 8(b)(1)(A) of the Act. It is well established that the proviso to Section 8(b)(1)(A) precludes any such interference with the internal affairs of a labor organization.")

N.W. (2d) 278 (Union fine of member for crossing a picket line during strike held arguably protected by the proviso to Section 8(b)(1)(A); UAW v. Woychik, 5 Wis. (2d) 528, 93 N.W. (2d) 336 (Union may recover fine levied against member for failure to picket during strike.); Retail Clerks v. Christiansen, Washington Justice Court, Grays Harbor County, 54 LRRM 2558 (Union may recover fines imposed against members who continued working during strike. "It is the court's opinion that inasmuch as there has been no interference affecting the right of defendants in their employment and that the action involves only the employees and the union, and the charges are based upon specific violations and the fines imposed under the authority of the bylaws, that this is an action which is one involving the internal affairs of the union and Sections 7 and 8 of the Act are inapplicable.

[A] union may reasonably discipline its members for infractions of its laws, rules and regulations so long as the discipline does not de-

American Newspaper Publishers' Association v. N.L.R.B., 193 F. 2d 782, 800-801 (C.A. 7).

agreed with the Board that a union did not violate Section 8(b)(1)(A) by threatening to expel any member who worked in a composing room where all the employees were not members of the union.

It is also significant that while the Board, during the 12 years following Taft-Hartley, has interpreted Section 8(b)(1)(A) and its proviso so as not to interfere in a union's internal affairs,12 Congress has not indicated that a broader interpretation of the Section was intended or desired. Moreover, as pointed out by the Trial Examiner, the legislation which Congress did enact in 1959 sheds further light on the problem before us and buttresses the conclusions which we reach. The Landrum-Griffin amendments contain a fairly comprehensive code governing the internal affairs of labor organizations. Jurisdiction over these matters was not, however, given to the Board. Rather it was the Federal Courts which were authorized to enforce the new law.18 Furthermore, insofar as is relevant here, these 1959 amendments went no further than to impose certain notice and hearing requirements on the imposition of union discipline14 and prohibited the use of such discipline to prevent employees from exercising certain fundamental freedoms.15

¹² See Minneapolis Star and Tribune Company, 109 NLRB 727, 729. We do not agree with the General Counsel that there is an implication in the Board's decision in that case that the imposition of the fine was collectible only by threat of expulsion.

¹⁸ See McCraw v. United Association, Local Union No. 43, U.S. District Court, Eastern District of Tennessee, 216 F. Supp. 655 (1963). See also Labor-Management Reporting and Disclosure Act of 1959, Title I, Section 102.

¹⁴ Labor-Management Reporting and Disclosure Act of 1959, Title I, Section 101(a)(5).

¹⁶ Labor-Management Reporting and Disclosure Act of 1959, Title I, Section 101(a)(2).

These laws show that Congress has not ventured to the outermost limits in regulating internal union affairs. Some subjects still remain unregulated under existing Federal law. Thus, we cannot agree that, 12 years earlier, Congress had enacted the substantial and far reaching limitations on the powers of unions to prescribe rules governing the conduct of their members, as urged by the General Counsel.

Our dissenting colleague argues forcefully that the proviso to Section 8(b)(1)(A) permits the imposition of union rules on employees as union members, but does not apply to the enforcement of rules against employees as employees: Proceeding from this premise, the dissenting opinion then finds that the subjects of production and wages are matters "clearly related to employment and not to membership. . . . " But the conclusion does not follow the distinction. Obviously, production and wages are related to jobs. Jobs are related to employees and employees may, if they so desire, be union members. A union rule that a member is subject to a fine if he exceeds a production ceiling does not mean that he is subject to such a fine as an employee. Nor does it mean that his employment status is affected so long as the Union does not attempt to exact payment of the fine by pressure on his employer or discrimination in his job opportunities.

It should not need saying that unions exist for the purpose of collective bargaining with respect to wages,

¹⁶ See Aaron, The Labor-Management Reporting and Disclosure Act of 1959, 73 Harv. Law Rev. 851.

¹⁷ See the Supreme Court's observation in the Curtis case that later statutes may be taken into account in interpreting vague language of an earlier law. N.L.R.B. v. Drivers, Chauffeurs, etc., Local 639 (Curtis Brothers), 362 U.S. 274, 291-292.

hours, and conditions of employment. Necessarily, their constitutions and bylaws reflect this basic purpose. In a sense, virtually all union rules affect a member's employment relationship.

But the Board has not been empowered by Congress to police a union decision that a member is or is not in good standing or to pass judgment on the penalties a union may impose on a member so long as the penalty does not impair the member's status as an employee. Our dissenting colleague's view would require the Board to sit in judgment on union standards of conduct for its members even though such standards are not enforced by threats affecting the member's job tenure or job opportunities. Whether or not the Union's rule in this case is desirable or equitable is a matter we need not and do not decide. It is sufficient, in our view, that the Union deliberately restricted the enforcement of its rule to an area involving the status of a member as a member rather than as an employee.

We find, in argument with the Trial Examiner, that the Respondent did not violate Section 8(b)(1)(A) of the Act.

ORDER

IT IS HEREBY ORDERED that the complaint filed herein be, and it hereby is, dismissed.

Dated, Washington, D. C., Jan. 17, 1964.

FRANK W. McCulloch, Chairman John H. Fanning, Member Gerald A. Brown, Member National Labor Relations Board Member Jenkins, concurring:

I concur in the result reached by the majority, but would predicate the result on a more simplified basis which concedes much of the argument advanced by my dissenting colleague. Nothing in the Act seeks to regulate the right of a labor union to place a ceiling on the earnings of its members. Therefore the subject matter of the rule, like other union rules pertaining to matters such as meeting attendance requirements, cannot be said of itself to offend the Act even if it were an unreasonable rule. The only issue presented by the Charge is whether in some manner the enforcement of the rule has restrained or coerced the Charging Parties in their exercise of Section 7 rights.

In the context of this case, it cannot be said that enforcement of the rule is coercive since the Charging Parties were free either to join the Union and be subject to the rule, or refrain from joining and not be subject to the rule. The Charging Parties would have it both ways. It is axiomatic that the rights guaranteed under Section 7 are not absolute rights and that alternative choices must often be made by those who would exercise those rights. Had the Union here sought a benefit for its members which was denied to nonmembers, the action would clearly have been coercive. Cf. Radio Officers v. Labor Board (Gaynor News), 347 U. S. 17. Certain it is, however, that where, as here, the Union imposes restrictions upon its own members which are not imposed upon nonmember employees, action may not logically be described as coercive. The fact thatsome members of the union dislike and refuse to abide by the rule no more causes it to violate the Act than did, the top seniority accorded to employees of the larger of two merged employers in Trailmobile Co. v. Whirls,

331 U. S. 40, or to shop stewards in Aeronautical Lodge v. Campbell, 337 U. S. 521.

Dated, Washington, D. C., Jan. 17, 1964.

HOWARD JENKINS, JR., Member NATIONAL LABOR RELATIONS BOARD

· Member Leedom, dissenting:

This case presents the question of whether a union that has unilaterally promulgated a restrictive scheme of work production quotas may, with legal impunity, enforce that scheme against employees, members of the union, through the imposition of severe retaliatory penalties, including monetary fines.

Since 1938, Respondent Union has had an established scheme of production ceilings or work quotas. The production ceilings, first formulated pursuant to a "gentleman's agreement" between union members, were later formalized by a union resolution, and finally became the subject of a union bylaw. The bylaw, inter alia, provides that members who fail to abide by the work quotas shall be subject to a fine, and, in the case of habitual offenders, discipline by the Union on the charge of conduct unbecoming a union member. At present the production

18 The bylaw, in pertinent part, reads as follows:

A. The basic object of the Union is to protect members of the Union in their employment and to give them as much security as the industry can provide. The Local Union in its judgment and reasoning has established a production ceiling which it feels will bring more protection to the members. It follows that a member who is found in violation of the [sic] this rule is guilty of conduct unbecoming a union member.

B. Any member who violates these ceilings shall be subject to a fine of one dollar (\$1.00) for each violation. The violators shall be processed by not less than 3, nor more than [sic] than 5 members of the Executive Board.

In case of persistent ceiling violations, the member will be charged with conduct unbecoming a Union Member.

per hour over'the machine rate, which is based on minimum employee production requirements.

The contract between the Employer and the Union contains a union-security provision. By its terms all employees are required to become members of the Union after the thirtieth day of employment or pay a service fee which shall not exceed the amount of the Union's monthly dues.¹⁹

The Employer has placed no limits on the employees' production or earnings and has vigorously opposed such a limitation, but without success. The Company is in a highly competitive market, and the increased costs resulting from the Union's production ceilings have caused a decline in its competitive position. The record shows that the Union's production ceilings have reduced and slowed down production, that an employee can reach the production ceiling in five hours, and that the employees have read books, played cards, and talked in the remaining time."

In February 1961, the Union discovered that the Charging Parties had been violating the work quota rule. Subsequently, a hearing was held before the Union's trial board, and each of the Charging Parties was found guilty of "conduct unbecoming a Union member,"

While, in light of the presence of the service fee provision in the contract it can not be said as a matter of law that all employees were required to join the Union, it is obvious that the contract provisions left so little to choice that, as a practical matter, the employees were compelled to join the Union in order to obtain the most value for the money they were required to expend.

²⁰ In spite of this, the employees produce more than the production ceilings allow. The excess is "banked" for payment in the future when an employee is unable, for any reason, to produce the maximum allowable under the production ceilings.

was fined \$50 to \$100, and was suspended from union membership. In October 1961, the Union brought suit against the Charging Parties in a state court to collect the fines.

On these facts, the General Counsel issued a complaint against the Union, charging that the fines that were imposed restrained and coerced employees in the exercise of their Section 7 rights and therefore violated Section 8(b)(1)(A) of the Act. My colleagues are validating the Union's actions. I disagree. In my opinion, my colleagues' holding misconstrues a very basic section of the Act, misinterprets Congressional intent, undermines Congressional policy, and disregards established precedent.

In refusing to abide by the Union rule, the employees were exercising their Section 7²² right to refrain from Union activity.²³ In fining the employees, the Union was attempting to force these employees to cease exercising

RIGHTS OF EMPLOYEES

respection (b)(1)(A) provides as follows: It shall be an unfair labor practice for a labor organization or its agents: (1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in Section 7: Provided, that this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein

²² Section 7 of the Act reads:

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a)(3).

²³ Printz Leather Co., Inc., 94 NLRB 1312. My colleagues apparently concede that the Charging Parties were exercising their Section 7 right in refusing to limit their production pursuant to the Union's rule for, absent such right, it would have been unnecessary to reach the issues discussed in the majority opinion.

that Section 7 right. The question is whether the fine employed by the Union as a sanction to compel the Charging Parties to comply with the Union rule constitutes restraint or coercion within the meaning of Section 8(b) (1) (A), and, if so, whether the Union's action is nevertheless protected by the proviso to that Section. I think it is clear that the fines imposed do constitute such restraint and coercion, and that the proviso does not afford any protection to the Union.

The Supreme Court has left little, if any, room for argument over the meaning of the words "restrain or coerce" used in Section 8(b) (1) (A). In N.L.R.B. v. Drivers, Local No. 639 (Curtis Brothers), 362 U. S. 274, which involved the question of whether recognitional picketing by a minority union constituted a violation of Section 8(b) (1) (A), the Court, after a thorough analysis, concluded that Section 8(b) (1) (A) was "a grant of power to the Board limited to authority to proceed against union tactics involving violence, intimidation, and reprisal or threats thereof—conduct involving more than the general pressures upon persons employed by the affected employers implicit in economic strikes."

A careful reading of the Court's opinion shows that the word "reprisal," as used by the Court, means economic as well as physical reprisal, and specifically includes financial exactions.³⁴ Thus, the Court referred to some

In this connection, I point out that the economic pressure inherent in a fine is not unlike the pressure caused by the threat of loss of employment which has always been recognized as economic "intimidation" or "reprisal" constituting a violation of Section 8(b)(1)(A). (See, for example, International Association of Bridge, Structural & Ornamental Iron Workers, 112 NLRB 1059; Marlin Rockwell Corporation, 114 NLRB 553, 562; Tellepsen Construction Co., 122 NLRB 568; Local 138 International Union of Operating Engineers (Nassau & Suffolk Contractors Assn.), 123 NLRB 1393, 1396. In my opinion there is little difference between a union's causing the discharge of an employee for refraining from engaging in concerted activity, and a union's fining

of the examples mentioned by Senator Ball in the legislative debates involving threats of "violence, job reprisals and such repressive assertions as that double initiation fees would be charged those who delayed joining the union," as the type of conduct against which Section 8(b)(1)(A) was directed; and the Court summed up the "central theme" of the legislative debates on the Section as seeking "the elimination of the use of repressive tactics bordering on violence or involving particularized threats of economic reprisal."

In the later International Ladies' Garment Workers' Union v. N.L.R.B., (Bernhard-Altmann) case, 366 U. S. 731, the Court set forth the proposition that Section 8(b) (1) (A) prohibited "unions from invading the rights of employees under Section 7 in a fashion comparable to the activities of employers prohibited under Section 8(a) (1)," pointing out that it was the "intent of Congress to impose upon unions the same restrictions which the Wagner Act imposed on employers with respect to violations of employee rights."

The Board itself in the past has read "restrain or coerce" in Section 8(b)(1)(A) in a manner consistent with the ordinary meaning of the term. Thus the Board has held that compulsion by sanctions, such as fines and

the partial, or total, equivalent of his salary for refraining from engaging in concerted activity. Each is an equally potent form of economic restraint and coercion, and the net effect of each on the employees involved could be identical.

of Senator Taft in which he stated that Section 8(b)(1)(A) was intended to outlaw threats of "economic reprisal," and also cited with approval the language of the Board's decision in *Perry Norvell Co.*, 80 NLRB 225, listing economic reprisal as one of the means proscribed by Section 8(b)(1)(A).

²⁶ Bernhard-Altmann, supra, at p. 738.

expulsion from membership, "are in fact coercive," and has also found that other forms of pressure directed against employees, including threats not to process grievances, threats of union disciplinary action and expulsion, and causing a reduction in seniority, likewise constitute restraint and coercion within the meaning of Section 8(b) (1) (A).

Accordingly, consistent with the foregoing authoritative case law, I am of the opinion that the fines levied by the Union against the Charging Parties in the instant case constitute restraint and coercion under Section 8(b) (1) (A) of the Act.³¹

The proviso to Section 8(b)(1)(A) does not compel a contrary conclusion. That proviso excepts from the

^{**} Peerless Tool and Engineering Co., 111 NLRB 853, 857; see also Minneapolis Star and Tribune Co., 109 NLRB 727, in which the Board adopted the Trial Examiner's conclusion that a fine was a "form of coercion."

²⁸ Ibid.

^{**} Local 401; International Brotherhood of Boilermakers (M.A. Roberts & Co.,), 126 NLRB 832, 834; United States & Allied Products Workers (Gibsonburg Lime Products Co.), 121 NLRB 914.

30 Miranda Fuel Company, Inc., 140 NLRB 181.

³¹ The legislative history of Section 8(b)(1)(A) fully supports this interpretation that the language, "restrain or coerce," covers the conduct herein. Section 8(b)(1)(A) originated in the Senate as an amendment to S. 1126. It was sponsored by a group of Senators who could "see no reason whatsoever why [unions] should not be subject to the same rules as the employers" and accordingly introduced Section 8(b) (1) (A) as a corresponding section to 8(a) (1). (Senate Report No. 105 on S. 1126, Supplementary views, Leg. Hist, of the LMRA, 1947, Vol. I, p. 456) Senator Ball, who introduced the amendment, explained that its purpose was "to insert an unfair labor practice for unions identical with [Section 8(a)(1)] ..." which was essential "to equalize the rights and responsibilities of both employers and unions in this field, to really assure to employees the fredom supposedly guaranteed in Section 7, ..." (Leg. His. of the LMRA, (1947), Vol. II, p. 1018, 1021.) During the debates, Senators repeatedly stressed that Section 8(b) (1) (A) was to be read and interpreted as broadly as its Wagner Act counterpart. When Senator Pepper asked what the interpretation of the language "restrain or coerce" would be, Senator Taft answered that "the Board has been defining those words for 12 years . . ." and although the "application to labor organizations may have a slightly

ambit of 8(b)(1)(A) only such restraint or coercion that results from a union's application of its rules relating to "the acquisition or retention of membership."32

different implication . . . from the point of view of the employee the two [sections] are parallel." (Leg. Hist. of the LMRA, 1947, Vol. II,

p. 1028, and to the same effect p. 1032-33.)

Contrary to my colleagues, it does not appear that Congress intended to limit Section 8(b)(1)(A) to any particular type of retraint or coercion. In the course of the debates, examples of the conduct that would be prohibited by Sestion 8(b)(1)(A) included threats of higher initiation fees or higher dues, "retaliatory" internal union disciplinary action, threats to strike, threats to picket, threas of loss of employment, economic pressure, and misrepresentation. (Leg. Hist. of the LMRA (1947) Col. II, pp. 1018-1019; 1200; 1205; p. 1029; p. 1030; p. 1031; p. 1192-93.) No attempt was made by Congress either to exhaust or to construct the scope of the statutory language. Further, I do not agree with my colleagues that the House understood that Section 8(b)(1)(A) covered only that conduct which had been dealt with under Section 12(a)(1) of the House Bill (H.R. 3020). Rather, the House Conference Report shows that Section 8(b)(1)(A) included, but was not limited to, the conduct outlawed by Section 12(a)(1) of the House Bill. Leg. Hist. of LMRA, 1947, Vol. II, p. 546.

32 The legislative history of the proviso clearly shows that the restrictive terms in which the proviso was written were not chosen by accident, but by design, and that Congress meant just what it said, no more. The proviso originated in the Senate and was offered by Senator Holland as an amendment to Section 8(b)(1)(A). In introducing the amendment; Senator Holland stated that the proponents of Section 8(b)(1)(A) had not intended that section "to affect at least that part of the internal administration which has to do with the admission or the expulsion of members, that is with the question of membership," and that his amendment (the proviso) "would make clear that [Section 8(b)(1)(A)] would have no application to or effect upon the right of a labor organization to prescribe its own rules of membership either with respect to beginning or terminating membership." (Leg. Hist. of LMRA, 1947, Vol. II, pp. 1139, 1141.) Senator Ball, who accepted the proviso as an amendment to Section 8(b)(1)(A), replied that "it was never the intention of the sponsors of [Section 8(b)(1)(A)] to interfere with the internal affairs or organization of unions," subsequently described the proviso more specifically as covering "the requirements and standards of membership in the union itself." (Leg. Hist. of the LMRA, 1947, Vol. II, p. 1141; p. 1200.) In the face of these authoritative statements from the two men in the Senate most intimately acquainted wih he proviso, I cannot, as my colleagues do, subscribe to an interpretation based on the more general characterizations of certain legislators.

As the Board stated in Marlin Rockwell Corp., 114 NLRB 553, 562:

As we read the 8(b) (1) (A) proviso, its sole purpose is to guarantee to unions the privilege, as a voluntary association, to determine both who shall be a union "member" and what substantive conditions a "member" must comply with in order to acquire or retain union membership status. It is for this reason that the Board cannot and will not judge the fairness or unfairness of internal union determinations which may enable or disable particular individuals to obtain the incidental benefits of union membership as provided by internal union legislation. (Emphasis supplied.)³³

And more recently, in Allen Bradley Co. v. N.L.R.B., 286 F. 2d 442, the Seventh Circuit shared this view of the scope of the proviso saying:

... [The] Board strenuously insists that the Company proposal was not a subject for bargaining because the Union in its coercive activities was protected under the proviso in Section 8(b) (1) (A), which authorizes the Union to prescribe its own rules "with respect to the acquisition or retention of membership therein." True, the fines which the Union had previously imposed and about which the Company was concerned were authorized by Union rule. Even so, there is nothing in the situation before us which indicates that such fines bore any relation to the "acquisition or retention of membership." The Board evidently recognizes this because it argues, "imposition of the fine is merely a step in determining membership status; non-payment leads to expulsion." We assume that a union has broad powers in prescribing rules relative to the acquisition and retention of its members. However, that power, in our view, is not absolute. It goes beyond

See also The Babcock & Wilcox Co., 110 NLRB 2116, 2132-3.

any permissible limit when it imposes a sanction upon a member because of his exercise of a right guaranteed by the Act. Coercive action whether by way of fine, discharge or otherwise, which deprives a member of his right to work and his employer of the benefit of his services, cannot be said to relate only to the internal affairs of the union. (Emphasis supplied.)

I find the rationale of these dases most persuasive for it comports with the language of the proviso itself as well as its legislative history. This rationale, moreover, achieves the accommodation intended by Congress between the rights Congress guaranteed employees and the right of unions to determine their own qualifications for membership. In my opinion, therefore, it cannot reasonably be said that the Union's conduct here related to its right "to prescribe its own rules with respect to the acquisition or retention of membership..." Accordingly, I conclude that Respondent's conduct is not protected by the proviso.

According to my colleagues, the proviso to Section 8(b)(1)(A) protects all internal union affairs or all action taken pursuant to the union's rules and internal processes. They attempt to prove that the proviso does not mean what it says by arguing that Congress did not in tend to distinguish between expulsion and any other form

My colleagues atempt to distinguish the Allen-Bradley case on the ground that the Court was not called upon to find" whether the union had a right under Section 8(b)(1)(A) to fine a member for crossing a picket line and that, according the above portion of the opinion was obiter dictum. However, as the portion of the Court's opinion quoted above clearly shows, and as a reading of the Board's decision and brief in that case will confirm, the Board argued in that case that the union's conduct which the employer wished to subject to bargaining was protected by the proviso to Section 8(b)(1)(A). Therefore, it cannot rightly be said, as my colleagues do, that the Court's discussion of this issue "was not essential to a decision in the case."

of union discipline, such as a fine, in the application of the proviso. However, in view of the special treatment Congress gave expulsion, as opposed to any other form of coercion by union discipline, I think that Congress did intend such a distinction. Employees are specifically protected against coercion in the form of expulsion by the second proviso to Section 8(a)(3), which guarantees employees that expulsion for any reason other than non-payment of dues and fees will not imperil their job security. Thus, Congress preserved the right of unions to deny membership to, or terminate the membership of, whomever they pleased regardless of the reason; but, at the same time, Congress insulated employees from coercion by making sure that they would suffer no economic consequences as a result of such action.

But even assuming that the proviso has a broader reach than I would ascribe to it, I would still disagree that the matter here involved is one that is merely a matter of internal union regulation. Employees may occupy a dual status: first, is their status as employees; second, is their

³⁵ My colleagues argue that no action has been taken here to impair the employees' job status or job opportunites. Apparently, they are unwilling to recognize that impairment of job status or job opportunities can take the form of restricting an employee in his earnings where, as here, that employee is willing to work and the employer wants the benefit of his services. That the fines were intended to have this restrictive effect cannot be denied.

Bist. of LMRA, 1947, Vol. II, p. 1141-1142 and also p. 1096-97. As shown by the above rationale, there is nothing inconsistent in the decision of the Court of Appeals for the Seventh Circuit in Allen Bradley and the decision of the same court in American Newspaper Publishers' Association v. N.L.R.B., 193-F. 2d 782. The latter case involved a union's threat to expel members, conduct which specificially falls within the proviso. Speaking of the proviso, the court said:

^{...} Congress left labor organizations free to adopt any rules they desired governing membership in their organizations. Members could be expelled for any reason and in any manner prescribed by the organization's rules, so far as 8(b)(1)(A) is concerned.

status as union members. Those matters affecting employees as union members may appropriately be referred to as internal union affairs. Those matters which affect employees as employees are not internal union affairs. Of course, it is quite possible that some matters may affect both the employment relationship and the membership relationship, but to the extent they involve the former, they are not internal union affairs. Here, I am satisfied that the Union's attempt to control production and wages, which are subjects clearly related to employment, and not to membership, is not merely an internal matter.

Under my colleagues' reading of the proviso, it would appear that the Union can turn any employment matter or Section 7 right into an internal union affair simply by adopting a union rule or bylaw dealing with the subject and disciplining employees thereunder." But there is no evidence that Congress ever intended to permit the subversion of employees' rights by unions under the guise of

For example, prusuant to a union rule or bylaw, unions, under my colleagues' decision, could now fine employees for filing charges with the Board against the union, for testifying against the union in Board proceedings, for filing a decertification petition, for refusing to give the union a copy of any statement made to a Board agent, for giving a statement to a Board agent without the union's approval, for refusing to participate in unlawful union activity, for working with nonunion employees, for working with Negro employees, for filing a grievance not approved by the union, for producing more than a certain number of items per day, and for working more than 30 hours per week.

regulating the conduct of union members. In short, I think that when unions use the union membership of employees — membership which may, or may not, be voluntary — as a means of encroaching on their rights as employees, which Congress did regulate, the unions subject themselves to the sanctions of Section 8(b)(1)(A) of the Act. More particularly, by imposing fines on these employees because they exceeded the Respondent Union's unilaterally established work production quotas the Respondent Union took action which went beyond any permissible limit, that is, the action taken did not relate only to the internal affairs of the Respondent Union but imposed a sanction on its members because they exercised their right, guaranteed by the Act, not to go along with the Union imposed production quotas.

Accordingly, for all the foregoing reasons, I would find that the Respondent violated Section 8(b)(1)(A) of the Act, as alleged.

Dated, Washington, D. C., Jan. 17, 1964.

BOYD LEEDOM, Member
NATIONAL LABOR RELATIONS BOARD

v. Borden 373 U. S. 690, in which the Supreme Court recognized that even though the union's action was based on the employee's failure to comply with internal union rules "it is certainly 'arguable' that the union's conduct violated Section 8(b)(1)(A), by restraining or coercing Borden in the exercise of his protected right to refrain from observing those rules..." The Court went on to distinguish its earlier decision in I.A.M. v. Gonzales, 356 U. S. 617, on the ground that Gonzales involved matters relating to expulsion which was an internal union affair, not within the Board's competence by virtue of the proviso to Section 8(b)(1)(A). See also Local 207, International Association of Bridge, Structural and Ornamental Iron Workers Union v. Perko 373 U. S. 701.



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Supreme Court of the United States

OCTOBER TERM, 1968

No. 273

RUSSELL SCOFIELD, LAWRENCE HANSEN, EMIL STEFANEC, and GEORGE KOZBIEL,

Petitioners,

NATIONAL LABOR RELATIONS BOARD and INTERNATIONAL UNION, UAW-AFL-CIO,

Respondents.

AMIOUS CURIAE BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

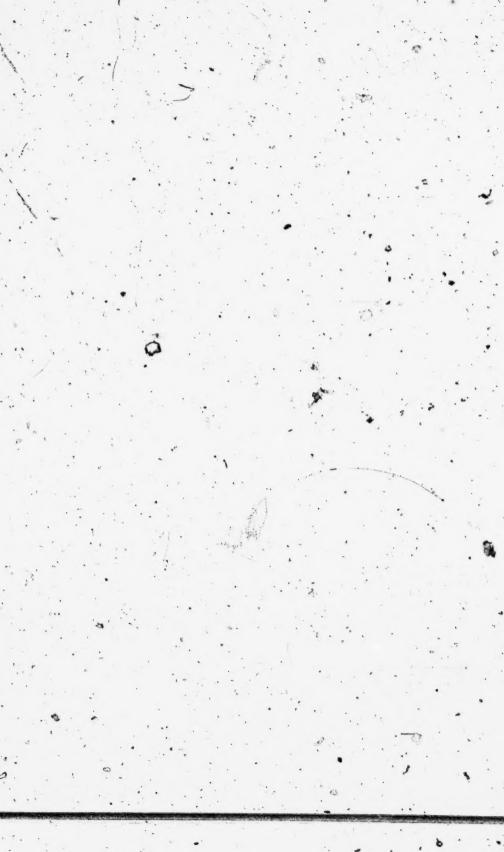
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Supreme Court of the United States

OCTOBER TERM, 1968

No. 273

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28.

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200 S. Michigan Avenue
Chicago, Illinois

PETITION SUPPORTED.

Russell Scofield, Lawrence Hansen, Emil Stefanec and George Kozbiel have petitioned for a Writ of Certiorari to review the decree of the United States Court of Appeals for the 7th Circuit entered in this case on April 16, 1968.

The Petition was docketed in the Supreme Court on July 6, 1968 as No. 273, October Term, 1968.

PARTIES' CONSENTS.

The Consent of the Office of the Solicitor General of the United States to the filing of an Amicus Curiae brief was sought and obtained on July 22, 1968. The Consent of the Union, (International Union, United Automobile Aerospace and Agricultural Implement Workers of America-UAW) was sought on July 1, 1968 and obtained on July 3, 1968.

INTEREST OF AMICUS CURIAE.

The interest of the Amicus Curiae is almost patent. It derives principally from two sources. It derives from the nature of the subject matter of the question presented; it derives from the nature, purpose and objectives of the Illinois Manufacturers Association.

The Illinois Manufacturers Association is an organization comprised of manufacturers located in every section of the State of Illinois. It is at once the largest and oldest organization of its kind in the United States. Five Thousand Three Hundred (5,300) industrial establishments comprise its membership. Thirty Thousand executives comprise its management personnel. Over one million persons are employed in the establishments. Manufactured are a wide range of products. Over \$19 billion

of goods (value added by manufacturer) are involved annually. Ninety-five percent of the manufacturing output of the State is produced by member firms. While practically all representative industries in Illinois of all. sizes are members of the IMA, the great bulk of the member firms (moré than 1500 of them) employ fewer than 20 persons. Fifty-two industrial leaders comprise the Board of Directors and Advisory Board of the IMA. Their companies are a cross section of industry classifications. They range from the smallest to the largest in employment and are distributed geographically throughout the State. Through representation on the Board of Directors, the Advisory Board and IMA committees, and through cooperation with the Illinois Industrial Council (an affiliate of the IMA), practically every industrial community in Illinois participates in the formulation of IMA policies. In order to implement its policies and programs, IMA maintains a staff of 30 persons in its Chicago and Springfield offices. Staff members deal with the problems of Illinois manufacturing industry.

The subject matter of the Question Presented upon which review is sought touches upon the very nerve center of the Collectively Bargained employment relationship. In the employment relationship the Illinois Manufacturers Association can be seen to have a substantial and vital interest.

QUESTION PRESENTED.

Whether a union restrains or coerces an employee in the exercise of a right guaranteed by Section 7 of the National Labor Relations Act, in violation of Section 8(b)(I)(A) of the Act, when the union fines an employee, and attempts to collect such fine by court action, because the employee performed work and earned wages in excess of certain production quotas established and enforced by the union.

In the Court below an intensive concentration upon the explicit issue therein raised may have led to less than sufficient attention to the effect of the holding below upon the whole of the law of the labor relationship.

For a Union to restrain or coerce an employee in his exercise of the rights guaranteed under Section 7 of the Act is to wrong him unless the wrong is excused by the proviso of Section 8(b)(1).

That proviso intends to leave untrammeled the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership.

The Court below seems to have held that this permissiveness embraces the right to fine for breach of a Union rule prohibiting production in excess of a union-set ceiling. That the employee was restrained and coerced is conceded. That the restraint or coercion was excused because it was for breach of a rule with respect to acquisition or retention of membership seems to have been the holding.

REASONS FOR GRANTING THE WRIT.

The Writ should issue because:

- 1.) The Public Policy of the United States to promote and encourage the practice of Collective Bargaining is damaged by the holding below;
- 2.) An unwarranted application of a holding of this Court in another case is said to require the holding below; (National Labor Relations Board v. Allis Chalmers Manufacturing Co., 338 U.S. 175;)
- 3.) The deeper significances of the holding below have escaped attention;
- 4.) A sister Circuit properly held contra to the holding below; (Associated Home Builders of the Greater East Bay, Inc. v. National Lubor Relations Board, 352 Fed. 2d 745;)
- 5.) The opinion below is, at the very least, in need of clarification;
- 6.) A subsequent opinion of this Court has established at least one boundary to union fining beyond which the Union may not go. (National Labor Relations Board v. Industrial Union of Marine & Shipbuilding Workers of America, A.F.L.C.I.O., 68L.R.R.M. 2257.)

- 1.) It is the declared policy of the United States to encourage the practice and procedure of Collective Bargaining. National Labor Relations Act (61 Stat. 136, 29 U.S.C. 151, et seq.), Section 1. Absolutely requisite, the ingredient "sine qua non", to Collective Bargaining is good faith bargaining and consequent Agreement. Neither party to the process can leave the bargaining table whereon agreement has been reached, free or at liberty to alter or change the commitments mutually made. Not precluded by this statement are those honest differences of interpretation and application which provide the dayin day-out grist of contract implementation. Definitely precluded is anything like a license to either of the parties to the relationship, as a matter of right, unilaterally to alter or change the terms of the commitment.
- 2.) This Court's holding in Allis Chalmers (supra) is regarded by the Court below as controlling upon it. The case is readily distinguishable. The rationale supporting the right of a Union to discipline members who cross picket lines established during the course of a legal strike, a right arguably necessary to the very survival of the labor organization, cannot be expanded to embrace the right to fine an individual member during the life of a Collective Bargaining Agreement for giving his personal meaning to his promise to supply a given quantity of his labor.
- 3.) The deeper significance of the issue upon which review is sought becomes more evident when consideration is given to so basic a concept as the one set forth in (2) above. Nothing less than the nature of the Labor Agreement comes into issue when the case is cast in this light.

Parties to a Labor Agreement have reached accord upon the value of a measurable amount of human labor. Through their Agent for Collective Bargaining, employees market their labor. They are free to propose that they deliver a unit of their labor which will produce an indeterminable amount of production. They are free to propose that they can be expected to produce an explicit quantity of production over an indeterminate amount of time. Whichever is the case, when the Labor Agreement is concluded, the supplier of labor is obliged by virtue of his commitment to abide by his promise. He is not free to return to the union hall and unilaterally set a limit upon his commitment.

To issue the Writ sought will further assure that ever more specific content will be given to what is thus encouraged; to allow the decision below to stand will promote confusion and uncertainty.

The Ninth Circuit Court of Appeals, in Associated. Home Builders of the Greater East Bay, Inc. v. National Labor Relations Board, 352 Fed. 2d 745, confronted with the issue of validity of a Union fine imposed upon members employed in the building trades who exceeded a ceiling set by Union rule, held, and Amicus Curiae thinks properly held, that the Union fine was violative of the whole conception of the relationship in the process of Collective Bargaining. The Court remanded the whole dispute to the Board for disposition in accord with the observations summarized. The Board had upheld its Trial Examiner's finding that no Sec. 8(b)(1)(A) violation had occurred. The Board had cited its holding in instant case as precedent, citing Local 283, U.A.W. (Wisconsin Motor Corporation), 145 N.L.R.B. No. 109. In its observations, the Court said:

"The rules relating to the limitation of production are plainly rules adopted for the purpose of establishing the terms and conditions of employment for Union members. The rule is not directed merely to the employees; it has a direct impact upon the employer... It follows that the rule imposed here cannot come within the proviso of Sec. 8(b)(1)(A), for this was not a mere prescribing by the Union of rules 'with respect to acquisition or retention of membership therein'..."

5.) The opinion below requires clarification because of ambiguity, evidenced by this excerpt:

"Petitioners argue that the present rule circumvents the bargaining process, and that the Union should have to obtain a provision against incentive pay through Collective Bargaining with the Company. Since petitioners concede that the Union can validly impose ceilings through collective bargaining, it is not great departure to allow them to be imposed by a disciplinary rule enforcing ceilings already established by collective bargaining. If a union has validly established a policy against over-production, it must have the concomitant power to discipline members who violate ceilings."

If Allis Chalmers (supra) was the basis for denying review, the above reasoning cannot be summoned in support. The one excludes the necessity of the other.

5a.) The 7th Circuit Court of Appeals reads the law as holding that the Labor Organization can fine under these circumstances, on the ground that the establishment of a ceiling on production is a matter internal to the discipline of the Union. 67 L.R.R.M. at page 2675.

If the decision below stands for the proposition that a Union can unilaterally establish a production ceiling and fine a member for exceeding it because the matter

is "internal to union disciplines" it should not stand as law. Such a rule is not internal only but vitally affects what is in essence a relationship, a thing which has elements of internalness of both parties to the relationship, and things which are in fact internal/external. The Union has bi-partite functions to exercise; the Management has bi-partite functions to exercise. In the exercise of such functions it is blindness to assert that such functions are internal only. Associated Home Builders (supra).

5b.) If the decision below stands for the proposition that the Union fine was valid because it constituted an enforcing of a collectively bargained condition of employment, and is valid for that reason and not for the reason that it was internal to union interest only, the importance of such a pronouncement should not be obscured.

The opinion of the Court of Appeals may have been intended to rule that the Collective Bargaining Agent can negotiate for a ceiling upon production. But this is not clear.

6.) Union expulsion from membership as a penalty for going to the National Labor Relations Board is violative of 8(b)(1)(A). National Labor Relations Board v. Industrial Union of Marine & Shipbuilding Workers of America, A.F.L.C.I.O., 68 L.R.R.M. 2257. This case is a clear indication of a limit beyond which a Union may not go, even in a matter of internal concern, if substantial considerations of an overriding nature are present. Such considerations have been shown to be present in instant case.

CONCLUSION.

If Allis-Chalmers is good law, and if Marine & Ship-building is good law, somewhere between the extreme of the right of the Union to fine, pursuant to Allis-Chalmers, and the wrong of Union fining, pursuant to Marine & Shipbuilding, is the razor's edge.

Amicus Curiae Illinois Manufacturers Association suggests that the present case furnishes an opportunity to set a line of demarcation. As Amicus Curiae, it supports issuance of the Writ.

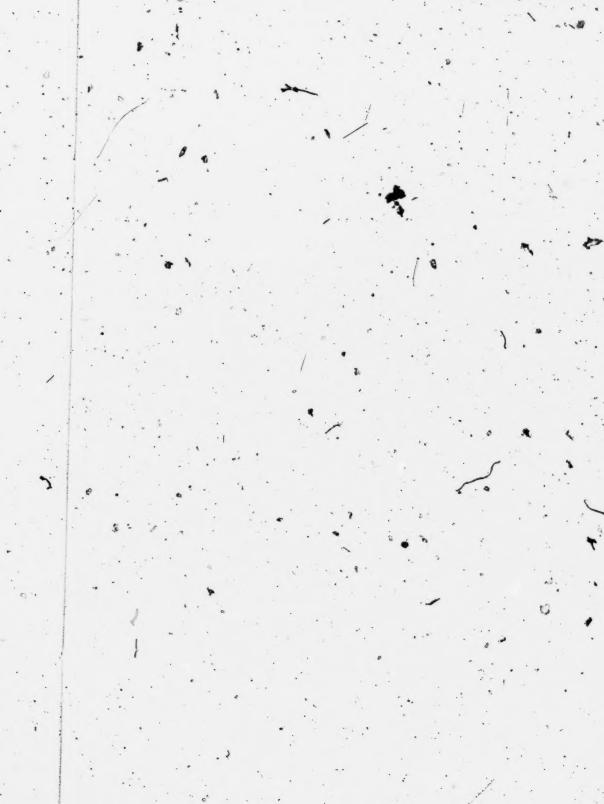
Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES OCTOBER TERM, 1968

No. 273

RUSSELL SCOFIELD, LAWRENCE HANSEN, EMIL STEFANEC, and GEORGE KOZBIEL, Petitioners,

12

NATIONAL LABOR RELATIONS BOARD and INTERNATIONAL UNION, UAW, Respondents.

BRIEF IN OPPOSITION FOR INTERNATIONAL UNION, UAW

In this case certain members of the UAW employed at Wisconsin Motor Corporation have challenged the Union regulation, in effect since 1944, which sets piece-rate pay ceilings for members of the Union. Evaluation of their challenge requires an understanding of the long struggle of the labor movement over incentive pay—a struggle from which was born the particular arrangement in this case, under which evils of that system are sought to be ameliorated by an upper limit on individual incentive earnings.

1. The historical opposition of labor and industrial unions to incentive pay requires no extensive documentation. See, generally, R.A. 103-108. In the early years of the century and in the formative years for industrial

^{1&#}x27;"R.A." refers to pages of respondent's (the Board's) Appendix in the Court below.

unions, including the UAW, hourly pay became the rallying cry of industrial workers hard-pressed by abuse of incentive schemes for speed-up and worker demoralization. The evils of incentive pay were obvious and numerous—1) the effort to earn a decent wage became a bitter daily contest between workers for maximum personal output; 2) as piece-workers exerted themselves to achieve adequate earnings, employers repeatedly reduced the piece rate in an endless and debilitating "speed-up"; 3) older and physically less capable workers would be fired or required to subsist on limited earnings while workers with more stamina would outdistance them on the payroll; 4) all of this produced inevitable jealousies and hostilities, further dividing industrial workers whom many employers desired at all costs to forestall from unity and union organization.

In the 1930s, when organization among industrial workers was achieved on a wide and significant front, the evils of the incentive system were further revealed by the "Stakhanov Movement" in Soviet Russia. In 1935, in an effort to increase industrial output, the Soviet government made a national hero of Aleksey Stakhanov, a coal miner who had achieved an unprecedented increase in his daily mining output. Stakhanovism symbolized to industrial unions in other nations the worst excesses of the speed-up squeeze. At the very first UAW Constitutional Convention held in 1935, there was heard the complaint against the American counterpart of the Stakhanovite method. During

A"Aleksey Stakhanov... [was] a coal miner in the Donets Basin, whose team succeeded in increasing its daily output sevenfold. The Soviet Government, anxious to speed up fulfillment of the Five-Year Plan, encouraged the Stakhanov movement, and Stakhanovite workers received high pay and other privileges. Whether it was spontaneous or not, the Stakhanov movement gained wide following... It has been widely criticised outside the USSR as another form of the speed-up system, fought by labor unions throughout the world." Columbia Encyclopedia, 2d Ed., p. 1880.

the debate on Resolution No. 225, one of whose five points was "abolition of speed-up and piece work," the following colloquy ensued.:

"Delegate Marshall, 93: There is something else I would like to state. Down in Kansas City we have the piece work system. They take the fastest man on the job and they base the piece work rate on that fastest man, and I think that is unjust to the entire crew. It makes it impossible for the men to maintain the standard of wages they should be able to maintain...

"President Martin: That is included in the abolition

of the piece work system."

2. In the late 1930s the UAW met with success in its efforts to replace incentive pay with hourly wages. But after Pearl Harbor the national interest in maximum defense production was urged in some quarters to support renewed use of incentive pay. This gave rise to grave concern within the Union's ranks, reflected in the "majority report on incentive pay" adopted by the UAW's Eighth Constitutional Convention in October of 1943:

"Whereas: The workers of the automobile industry, without submitting to the dangers and injustices of piece-work plans, have increased the productivity of the auto industry to the highest level in the history of

this or any other industry; and

"Whereas: Despite these facts the Automotive Council for War Production, representing management, management spokesmen in the War Production Beard, spokesmen outside and inside the union have within the last year inaugurated a drive for the introduction of piece-work systems or so-called incentive plans in the automotive and aigeraft industries.

"The International Union of the UAW-CIO reiter-

ates emphatically its traditional opposition to the introduction of incentive or piece-work plans in the plants within our jurisdiction where such plans do not exist. The International Union will continue to leave to the autonomy of Local Unions the continuance of piecework systems in keeping with the minimum standards set forth by the Columbus Board meeting.

"This Convention of the UAW-CIO takes a firm position against extension of incentive pay plans because we believe that piece-work will neither bring our Nation maximum war production nor provide workers with an adequate annual wage.

"Piece-work will result only in further aggravating the location and unbalancing of production schedules, resulting in layoffs, unemployment and dissipation of our manpower. Piece-work systems would have the result of further intensifying the problem of wage inequalities and differentials, will block the union's efforts to establish an industry-wide wage agreement based upon equal pay for equal work, and will further demoralize workers who are, at present, getting less money for doing the same work. Piece-work systems would reintroduce the old system of speed-up, in which the worker is robbed of higher earnings through management's using every insignificant engineering change or pretext to cut rates . . ."

Upon the approval of incentive rates by the War Labor Board, UAW locals sought to ameliorate the evils of incentive pay which had so long burdened industrial workers and interfered with the harmonious relationship of union members. In 1944 the workers at Wisconsin Motor Corporation, which had substantial numbers of its workers on incentive pay, determined that a formal ceiling should be placed upon piece-work earnings. The reasons for this

action are described in testimony by witness Norman Wold, who was a leader of the local union in 1944 (Tr. 553):

We talked about well, what are we going to do. We have got to do something. You know, in the shop. there around Thanksgiving Day or near Christmas, why there was layoffs and the fellows were getting older. Some of the fellows were getting older and the young fellows would come in and they would push, push, push, push, so we wanted to see that this labor state keep as many fellows working as we possibly could, and we know if we put this thing on there it would provide for at least a few more fellows to stay at work. So we thought the thing over. I'd say that it wasn't any board of directors. It was the group. They voted on it at the union and they have had many a chance over the years to kick it out or put it in or whatever. In fact, it has been brought up and I'd say ninety eight per cent of the fellows right today are 100 per cent for this ceiling because it provides jobs. . It provides for not too much pressure working piece work fellows. I don't know whether you have everdone that or not; but there is always a pressure, a pressure all the time. You want to make out. You want to make as much as you can . . . "

A regular membership meeting of the local union resolved on March 19, 1944, that "if, and when, the proposed machine base rates in the contract are approved by the W.L.B., the Union take steps to place a ceiling on piece work earnings. That a limit of 10¢ per hour over and above the proposed machine base rates be included in the next contract" (R. Exh. 9). A month later it was moved and carried at a membership meeting that "men turn in no more than 10¢ per hour over and above the new machine rates" (ibid). In 1946, the membership voted that penalties be

imposed in the form of fines for violation of the prevailing piece-rate ceilings (ibid).

3. Since its inception the Company has acquiesced in the operation of the Union piece-rate pay ceiling; it has incorporated in periodic agreements with the Union the level at which the piece-rate ceiling would be set; and it has taken no disciplinary action against any piece-rate employee who adheres to the incentive ceiling (R.A. 50-52, 95-96). The Company, however, has not itself enforced the ceiling, and has regularly paid every worker's validated earning claim, even if known to exceed the applicable ceiling. On the basis of the entire evidence the Trial Examiner found that the Union's incentive ceiling program "is the product of hard bargaining" in periodic negotiations between the Union and the Company (R.A. 52).

The Trial Examiner also set forth in the following terms the considerations which have led the Union to establish the

incentive pay quiling (R.A. 53):

"... the Union justifies the ceiling rule on the basis of apprehensions, which, as the literature on the subject would indicate, have their roots in industrial experience with incentive plans of earlier vintage, some of which have been acknowledged by management spokesmen as having been reasonably grounded... These include expressed concern that a stepped up pace could result in: (a) employees working themselves out of jobs, (b) usher in the evil of 'stakhanov-

³ For instance, the 1953 contract between the Union and the Company (G.C. Exh. 17) provided that the previous agreement be modified so as to "Increase the ceilings on all piece work jobs a total of thirteen cents (13¢) per hour effective July 1, 1953 over the ceilings on piece work jobs in effect on April 30, 1953." Similarly, the strike settlement agreement of August 14, 1956 between the Union and the Company provided (G.C. Exh. 22) that "The ceilings on earnings is to be raised ten cents (10¢) per hour above the general increase of 1-1-56 and the ten cents (10¢) of 5-1-56 or a total of 23¢ per hour."

ism', under which a new productive norm is set, whereby the piece rate is lowered and the compensation for actual productive effort correspondingly reduced, (c) lower grade employees by excessive dissipation of their allowances, earning more than those in the higher ones, thus dislocating the actual pay scale and bringing about morale-threatening jealousies, as well as undermining the health-protecting purposes of the allowances."

Concerning the Union's "legitimate interest" underlying the piece-rate ceiling regulation, the Examiner (R.A. 96) cited and approved authorities demonstrating "that the setting of production limits among pieceworkers is hardly new in our industrial life, and that it has its roots in experience under piecework and incentive plans giving rise to apprehensions, reasonably grounded, with which such a practice is designed to cope."

4. The Decision of the Labor Board accepts the findings of the Trial Examiner (Pet. p. 14a). In addition, the Board emphasizes the periodic bargaining between the Union and the Company over the incentive pay ceiling applicable to the Union's members, which the Company has accepted "as forming an important element of its negotiated wage structure." The Board reviews the Congressional history

⁴ As the Board found (Pet. p. 16a): "Although the Company does not consider itself bound by the rule, and at various times during negotiations has unsuccessfully sought to induce the Union to drop the ceilings, the Company nevertheless as a practical matter has accepted the ceilings as an integral part of the modus operandi and has recognized the ceilings as forming an important element of its negotiated wage structure. So far as appears, the Company has never sought to discipline any of its employees for adherence to the Union's ceiling restrictions. The Company uses the ceilings in computing wages and evaluating jobs. Ceilings have also played an important role in the negotiation of collective-bargaining agreements between the Company and the Union. Thus, in 1953, one of the Company's proposals was that the ceilings be increased at least 10 percent. The contract that year made provisions for a 13 cents per hour

and finds no evidence "that Section 8(b)(1)(A) was intended to interdict the conduct under examination" (Pet. p. 18a).

5. The majority in the Court below finds this Court's decision in Labor Board v. Allis-Chalmers Manufacturing Co., 388 U.S. 175, dispositive in favor of an affirmance of the Board's ruling. In reaching that conclusion the Court does not purport to apply Allis-Chalmers in any rubber stamp fashion. On the contrary, the opinion carefully reviews and approves the Board's finding that "ceiling rules derive from a legitimate, traditional interest in union objectives", having to do with the effect of unrestricted incentive pay upon employment security, employee morale, and employee health (Pet. p. 9a). The Court concludes that the union rule here in issue "has a rational basis, and we cannot say that it was not reasonably calculated to achieve a permissible end" (Pet. p. 10a). Thus, as an instance of a legitimate union rule enforced by a reasonable disciplinary fine, this case does not differ in any significant respect from the situation before this Court in Allis-Chalmers just two terms ago.

increase in ceilings. The 1956 strike settlement agreement provided for another increase in ceilings. In 1959, the Company made no request for the elimination of ceilings, but only requested that they be increased 10 cents.

[&]quot;Moreover, while abstaining itself from enforcing the ceiling rule, the Company voluntarily aids and cooperates with the Union in the administration of the rule. Thus, the Company joins in the banking' procedures by making the necessary bookkeeping entries. The Company also allows the ceilings to be posted on its bulletin boards. And it assists the Union in policing enforcement of the rule by making available to the Union the members' production records and allowing the union stewards to inspect such records on Company time without loss of pay."

Reason for Denying the Writ: The Question Presented Was Definitively Resolved by the 1966 Allis-Chalmers Decision.⁵

1. The governing standard for decision in the present case was announced by this Court in Labor Board v. Allis-Chalmers Manufacturing Co., 388 U.S. 175. We need not belabor here the general applicability of that precedent to claims that union fines violate Section 8(b)(1)(A) of the National Labor Relations Act. As demonstrated in the majority opinion below, and in the Opposition for the National Labor Relations Board, in Allis-Chalmer's this Court held that fines enforcing legitimate organizational norms upon a union's own members are not within the area of the Labor Board's statutory jurisdiction. That holding is now controlling in union fine situations and Section 8(b)(1)(A) can have no application unless the challenged union rule is entirely "ultra vires" and beyond the area of the union's legitimate concern. Far from being outside the area of the union's legitimate interests, piece-rate earnings ceilings are squarely within the union's legislative judgment, reflecting concern for protection of workers and union members from the evils of unrestrained incentive pay.

2. In the area of wages, hours and working conditions,

Even deem it our responsibility to suggest that the Petition for Certiorari in this case was filed out of time. Rule 23 of the Court below provides that, except in the case of a decree enforcing the order of an administrative tribunal (this was an appeal by petitioners rather than an enforcement action by the Board), the "judgment shall be entered on the date the opinion is filed." The opinion of the Court below (Pet. p. 3a) was filed on March 5, 1968 and the judgment was duly filed on the same day (see Appendix, infra, p. 15). It is true that on April 16, 1968 a decree was issued by the Court below (Pet. p. 1a), but it was in terms practically identical with the judgment of March 5. Such a duplicate judgment does not toll the 90-day period for filing a petition for certiorari. See Department of Banking v. Pink, 317 U.S. 264; Cole v. Violette, 319 U.S. 581. Under these circumstances it appears that the governing date for computing the 90 days is March 5, 1968, when the judgment issued, and that the Petition filed on July 6, 1968, was four weeks late.

the union has indisputable power to make binding judgments concerning the interests of all employees it represents, and its discretion honestly exercised is not subject to judicial review. In the exercise of that statutory discretion it has been the consistent judgment of industrial unions—

*J. I. Case Co. v. Labor Board, 321 U.S. 332; Ford Motor Co. v. Huff-man, 345 U.S. 330. As this Court emphasized in Allie-Chalmers (388 U.S. at 180), national labor policy:

"extinguishes the individual employee's power to order his own relations with his employer and creates a power vested in the chosen representative to act in the interests of all employees. 'Congress has seen fit to clothe the bargaining representative with powers comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents * * * Steele v. Louisville & N.R. Co. 323 U.S. 192, 202. Thus only the union may contract the employee's terms and conditions of employment, and provisions for processing his grievances; the union may even bargain away his right to strike during the contrast term, and his right to refuse to cross a lawful picket line. The employee may disagree with many of the union decisions but is bound by them. The majority-rule concept is today unquestionably at the center of our federal labor policy.' 'The complete satisfaction of all who are represented is hardly to be expected. A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion."

It is noteworthy that in the present case collective bargaining is actually involved in the establishment and operation of the piece-rate ceiling. The Labor Board found that the Company has periodically bargained with the Union the level of its piece-rate ceilings and has "recognized the ceilings as forming an important element of its negotiated wage structure" (supra, p. 7). This, among other things, distinguishes Associated Home Builders v. National Labor Relations Board, 352 F. 2d 745 (C.A. 9, 1965), which petitioners and amicus Illinois Manufacturers Association purport to find in conflict with the decision below. But in Associated Home Builders the union rule in question was established after the execution of the collective bargaining agreement between the company and the union and was "precisely contrary to the provisions of that contract" (352 F. 2d at 751). Furthermore, the Court will look in vain for any holding as to the scope of Section 8(b)(1)(A); all the Ninth Circuit did was to remand to the Board for consideration of possible violations of Section 8(b)(3) and 8(d). If further distinctions were needed, the situation at bar does not involve a limit upon production as did Associated Home Builders; as the Court there stated, "the rule is not directed merely to the employees; it has a direct impact upon the employer" (352 F. 2d at 750).

reflected in the annual negotiation of thousands of collective bargaining agreements throughout the nation—that rather than incentive pay the workers' best interest is met by hourly pay which discounts entirely individual differences in employee productivity. See 2 BNA Collective Bargaining Negotiations and Contracts 93:6-7 (Aug. 12, 1965). A Labor Department study has found that 73% of production and related workers employed in the nation's manufacturing industries are paid on an hourly wage rather than a piece-rate basis. U.S. Bureau of Labor Statistics, Dep't of Labor, Extent of Incentive Pay in Manufacturing, Monthly Labor Review (May 1960).

Thus the union has statutory power by negotiation of straight hourly wages to discount entirely an individual employee's high productivity; and if, as is equally clear, the majority-chosen bargaining representative may do so even for employees who have never voted for or joined the union, then the piece rate earnings ceiling is a doubly a fortiori case of permissible union regulation. First, at Wisconsin Motor Corporation the Union has agreed with the employer that half of the work force shall be compensated on piece-rate rather than hourly basis, and in. this respect petitioners, who are in piece-rate jobs, are already permitted pay increments based on productivity denied their fellow employees on hourly wages. Second, petitioners joined the Union though they did not have to do so under the NLRA (see 388 U.S. at 197, n. 37; R.A. 65-66) nor under the "service fee" option arrangement between the Union and the Company; accordingly, unlike the ordinary employees required as such to accept union determination in the negotiation of their wages, petitioners made their own decision to belong and to accept union rules, including the piece-rate ceiling rule. Surely in the area of wage rates majority rule is not less binding

on those who opt for it within the union than on those who have it thrust upon them merely as employees for whom the union is the statutory bargaining representative. Thus it seems clear that a union empowered altogether to deny productivity pay to workers who never espoused the union, may set a maximum on the productivity pay of its own members.

Moreover, unions are even more concerned to prevent excessive productivity-pay-differentials among their own members than among workers whom they represent merely as members of the bargaining class. Excessive pay differentials which arise in the absence of a piece-rate ceiling often cause rivalry and bad feeling among workers-particularly in the ranks of older employees unable to work at a pace comparable to young men in their teens and twenties. Even in the plant the resulting tensions between workers are bad, though perhaps not intolerable. But within the union the same workers are related not merely as employees of the same employer; they are politically and socia 'y associated with each other to promote mutual interests. There the hostilities engendered by unrestricted productivity pay create a problem of real concern for the union as an operating association where the "generation gap" is a cause of constant friction and the added tension of large pay differentials favoring the younger over the senior member is much to be avoided.

In sum, the Trial Examiner, the Board, and the Court below, cannot be faulted in their conclusion that reasonable and tangible premises support the union rule here in issue. If Allis-Chalmers leaves any room for finding in some extreme case that discipline of members violates Section 8(b)(1) because the underlying union rule is unrelated to any arguable union interest, surely this case presents only a proper exercise of union authority directly re-

lated to the common interest of the members. From every point of view the present case is within the Allis-Chalmers holding that Section 8(b)(1)(A) "assures a union freedom of self-regulation where its legitimate internal affairs are concerned" (Labor Board v. Industrial Union of Marine Workers, 36 U.S.L. Week 4491, 4492.) *

5. Since this case raises essentially the same issue resolved in Allis-Chalmers, the petitioners are in effect requesting this Court to reconsider that ruling. But nothing has occurred since Allis-Chalmers which would warrant reopening the issue of statutory construction so recently and definitively adjudicated. On the basis of ample legislative evidence, this Court concluded that within areas of genuine concern Taft-Hartley provisions were not intended to restrict union discipline. If the Congress desires to intrude further under the National Labor Relations Act

TIt is also pertinent that the earning ceiling rule here in issue is far less severe in its economic effect than was the "no strikebreaking" rule in Allis-Chalmers. The ceiling rule does no more than to hold to a reasonable pay maximum workers who would otherwise outdistance others on the payroll because of their exceptional working speed and endurance. By contrast, the Allis-Chalmers rule barred any remuneration at all to union members during a strike, and even subjected them to the risk of the employer's filling their positions with permanent replacements. Compared to the impact of that rule, the impact of the incentive pay ceiling at Wisconsin Motor Corporation is modest indeed.

Both petitioners and the Illinois Manufacturers Association as amicus curiae appear to place some reliance, albeit minimal, on the *Industrial Union* case, amicus contending that it "is a clear indication of a limit beyond which a Union may not go . . ." (Amicus Br. p. 9). But it is a far cry from a collectively-bargained union rule setting a maximum on the productivity pay of union members to the expulsion from the union of one who has resorted to his legal remedies before the NLRB. As the Supreme Court said in the *Industrial Union* case (36 U.S.L. Week at 4494):

[&]quot;... where the complaint or grievance does not concern an internal union matter, but touches a part of the public domain covered by the Act, failure to resort to any intra-union grievance procedure is not grounds for expulsion from a union."

What is significant for present purposes is not *Industrial Union's* refusal to allow expulsion for resort to the Labor Board, but its reaffirmation of *Allis-Chalmers*.

into the area of union affairs it is free to do so. But unless and until Congress acts further, there is no occasion for this Court's reconsideration of the statute's impact upon matters of union concern.

Conclusion

It is respectfully submitted that the Petition for Certiorari should be denied.

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This Court's decision in Allis-Chalmers has recently survived a Congressional attack led by Senator Ervin. His proposed substitute for the 1968 Civil Rights bill (H.R. 2156), would have prohibited interference with any person's right "to pursue his employment by . . any private employer engaged in interstate commerce . ." The Senator supported this proposal by a frontal assault on the Allis-Chalmers decision (114 Cong. Rec. S 180-181). On February 6, 1968 a motion to table the amendment was passed by a vote of 54-29 (114 Cong. Rec. S 980). On March 8 (114 Cong. Rec. S 2462) Senator Ervin unsuccessfully sought to attach to the pending measure another similar provision which would have amended Section 8(b)(1)(A) to forbid union fines. (Citations to Cong. Rec. are to daily edition).

APPENDIX

United States Court of Appeals for the Seventh Circuit Chicago, Illinois 60604

Tuesday, March 5, 1968.

Before Hon. Win G. Knoch, Senior Circuit Judge, Hon. Luther M. Swygert, Circuit Judge, Hon. Walter J. Cummings, Circuit Judge.

No. 14698

RUSSELL SCOFIELD, LAWRENCE HANSEN, EMIL STEPANEC and GEORGE KOZBIEL, Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD, Respondent.

PETITION FOR REVIEW OF AN ORDER OF THE NATIONAL LABOR BELATIONS BOARD

This cause came on to be heard on the petition for review of an order of the National Labor Relations Board and the record from the National Labor Relations Board, and was

argued by counsel.

On consideration whereof, it is ordered by this Court that the petition to review and set aside the order of the National Labor Relations Board dated May 18, 1964, denying the motion of the petitioners for reconsideration of the decision and order of the National Labor Relations Board dated January 17, 1964, be, and the same is hereby Denied in accordance with the opinion of this Court filed this day; and upon presentation, an appropriate decree will be entered.

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In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 273

RUSSELL SCOFIELD, ET AL., PETITIONERS

NATIONAL LABOR RELATIONS BOARD and

INTERNATIONAL UNION, UAW-AFL-CIO

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-13a) is reported at 393 F. 2d 49. The Board's decision and order (Pet. App. 14a-38a) are reported at 145 NLRB 1097.

JURISDICTION

The Board's decision and order dismissed an unfair labor practice complaint which had issued upon petitioners' charges. On March 5, 1968, the court of appeals filed its opinion upholding the dismissal, and, on the same day, it entered a judgment (App. infra, pp. 15-16), denying the petition for review in accordance with its opinion. On April 16, 1968, the court of appeals issued a formal decree denying the petition for review (Pet. App. 1a-2a). The petition for a writ of certiorari was filed on July 6, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1). In our view, however, the petition is out of time under 28 U.S.C. 2101(c).

The March 5 judgment constituted a full, effective and formal determination of the proceedings in the court below. The Board order consisted simply of the dismissal of a complaint and contained no affirmative provisions to be enforced. Denial of the petition to review this order, therefore, formally effectuated in the March 5 judgment, left no further occasion for any exercise of discretion by the court below, and the subsequent decree entered by the court was superfluous. The April 16 decree thus did no more than to restate what had been ordered by the March 5 judgment. Since the petition was filed more than 90 days after entry of the March 5 judgment, which was for all relevant purposes "final," the petition is untimely.

¹ See Federal Trade Commission v. Colgate-Palmolive Co., 380 U.S. 374, 379; United States v. Adams, 383 U.S. 39, 41-42.

² Seventh Circuit Rule 14(*l*), like new Rule 19; Fed. R. App. P. (effective July 1, 1968), contemplates deferred filing of an operative final judgment or decree only where the court of appeals is *enforcing* an agency order, in whole or in part, so that formulation of an appropriate injunctive decree can take place. There is no corresponding recognition of a hiatus when the reviewing court has, as here, merely denied, categorically, a petition for review.

Federal Trade Commission v. Minneapolis-Honeywell Co., 344 U.S. 206, 211-212. See, also, Stern & Gressman, Supreme Court Practice (3d ed., 1962) p. 203, n. 7.

Even if the petition did properly invoke this Court's jurisdiction, there would in any event be no occasion for further review, as we shall briefly discuss.

QUESTION PRESENTED

Whether a labor union restrains or coerces employees in the exercise of rights guaranteed by Section 7 of the National Labor Relations Act, in violation of Section 8(b)(1)(A) of the Act, by fining its members for violating restrictions upon incentive earnings which had been adopted by the union and acquiesced in by the employer.

STATUTES INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 et seq.), are set forth at Pet. 2-3.

STATEMENT .

o1. The relevant facts are not in dispute. For many years the Union 3 has been the bargaining representative of the production employees of Wisconsin Motor Corporation ("the Company"). The employees, pursuant to the collective bargaining agreement, are required either to join the Union and maintain good

Local 283, United Automobile, Aircraft and Agricultural Implement Workers of America, UAW, AFL-CIO.

standing, or to decline membership and pay a service fee to the Union (Pet. App. 14a). About half of the Company's 850 production employees are compensated on a piecework, or "incentive" basis, whereby they may earn amounts in excess of their basic hourly wages by producing at a rate in excess of established norms of hourly output (Pet. App. 15a).

All incentive work is classified, under the bargaining contract, into five, different grades according to the skills involved. For each grade, the contract guarantees a minimum hourly rate called the "machine rate," which is periodically established by agreement between the Company and the Union (R.A. 14-17, 33, 45.)4 . Incorporated in the machine rate are allowances for such factors as setting up the job for production, picking up and loading, cleaning of tools, and the personal needs and fatigue of the worker himself (R.A. 15-16, 24-26). By minimizing the allowances mentioned and producing at a rate in excess of the "machine rate," an employee on incentive pay can increase his earnings, since the Company will compensate him for such excess production at a somewhat higher hourly rate (R.A. 6-7, 16-17, 45).

When such employees are absent from work, or their machines are required to be inoperative, or production activity is stopped, the bargaining contract provides that they are to be compensated either at the machine rate, or at a lower rate (called the "day rate"), depending upon the circumstances (R.A. 17, 18, 21-22, 47).

[&]quot;R.A." refers to respondent's appendix in the court below.

The Union, whose membership is limited to employees of the Company, has for many years discouraged its members from fully exploiting the opportunities for increased wages inherent in the Company's compensation scheme (R.A. 2-3, 10, 14, 46). To this end, "ceiling rates" have been established and members have been required not to charge the Company for any production which would yield an hourly earning rate in excess of this ceiling. The Union's rule, in its current form, provides:

A. The basic objective of the Union is, to protect members of the Union in their employment and to give them as much security as the industry can provide. The Local Union in its judgment and reasoning has established a production ceiling which it feels will bring more protection to the members. It follows that a member who is found in violation of this rule is guilty of conduct unbecoming a Union Member.

B. Any member violating these ceilings, shall be subject to a fine of One Dollar (\$1.00) for each violation. The violators shall be processed by not less than 3, nor more than 5 members of the Executive Board.

In case of persistent ceiling violations, the member will be charged with conduct unbecoming a Union Member. [R.A. 34, 46].⁵

Members do not violate the Union's ceilings by excessive production; the Union's rules do not seek to

Article 30 of the Union's International Constitution establishes the penalties for "conduct unbecoming a member of the Union" as suspension and/or fines from \$1.00 to \$100.00; expulsion from membership may follow nonpayment of fines (R.A. 35).

retard the flow of production but only to limit the amount of current earnings which members may receive from the Company (R.A. 5-8, 9, 17, 47-48). Instead of reporting excess production to the Company for immediate compensation, members are required to "bank" their earnings in excess of ceiling, and hold them in reserve for occasions when they earn less than ceiling (R.A. 5-8). For example, when an employee is absent or is unable to produce because his machine is not operating, the bargaining contract provides that the Company will compensate the employee at either the machine rate, or the lower day rate, depending on the specific reasons for nonproduction. At these times, the Union permits its members to draw upon their "bank," i.e., to collect for work previously produced but not reported for wage purposes.

The Company, however, has not bound itself in the bargaining contract to require employees to follow the banking process, and does not do so. If an employee

The Union's banking system has been a frequent subject of bargaining. Over the years, the Company has on various occasions begun-negotiations with a request that the Union eliminate its ceiling rate, but no agreement on this point has been reached. More frequently, the Company's bargaining position has included a proposal for the increase of ceiling rates and, as an inducement therefor, a raise in basic wage rates (R.A. 4-5, 8-10, 32-33, 51).

In addition, the negotiated ceiling rate plays an integral role in the Company's wage structure, since the parties determine the rate of compensation for production in excess of the machine rate by reference to the ratio between the machine rate and the ceiling rate (R.A. 11-12, 52).

company will make full payment even if this will exceed the Union's ceilings (R.A. 5-7, 48; R.A. 4). But if the employee follows the Union's rule, the Company will honor his choice by perthitting him to bank excess production for later payment (provided that all banks be depleted by annual intentory time (R.A. 17, 48)), and by paying him for this production during subsequent non-productive periods (R.A. 9, 18; Pet. App. 15a). Such a delayed production payment is a full substitute for, and is not in addition to, the machine rate or day rate payment which the Company would otherwise be bound to pay (R.A. 17, 18, 55).

Although Company representatives testified that they were opposed to the Union's banking system and preferred to let employees "earn as much as they can" (R.A. 53), they did acknowledge certain management advantages in the system.

In addition to permitting such a deferred payment system, the Company has also honored the banking system by supplying the Union with the employees' work cards to permit checking for individual compliance with the system (R.A. 3, 9, 48, 51).

^{*}For example, Plant Superintendent Bohmann explained that there was a financial saving to the Company when an employee draws against his bank for compensation during a "down time" instead of receiving his machine rate (R.A. 17-18, 55). He also acknowledged that the Company's production performance in this industry of high skill and precision was characterized by a low scrap rate which might well be jeopardized if employees became excessively pre-occupied with sheer quantity of production (R.A. 18-19, 54-55). Moreover, the Company has paid dividends without interruption

The Company witnesses also complained that the banking system has resulted in periods of voluntary worker idleness, especially before a vacation period or annual inventory time (R.A. 23-24, 53). On cross-examination, however, these witnesses conceded that the Company had recently promulgated orders curbing unnecessary idleness, and that these rules were effective in resolving the problem (R.A. 26). In addition, of course, the Company retains power to discipline or discharge employees who fail to produce a sufficient quantity to meet the machine rate level and the Company has not complained that this machine rate is set so as to sanction inadequate production for the wages paid (R.A. 15-16, 27-28, 56).

2. In February 1961, the Union conducted its semiannual examination of employee work cards (see note 7, supra, p. 7), and found that six members had violated the banking system by reporting to the Company, for immediate payment, production at a rate in excess of the Union ceilings (R.A. 29-80; 37-38). The Union served written charges upon each of the six members and notified them of their impending trial. As a result of the trials, all six members were fined in amounts ranging from thirty-five to one hundred

every year since 1946, when the Union first began enforcing its banking system (R.A. 55-56), and the average hourly earnings of the Company's incentive employees—despite the impact of the Union's ceilings—exceed that of employees in comparable local establishments (R.A. 18-14, 21, 54-56).

[•] The members were permitted to have counsel, and there is no contention that the Union disciplinary machinery failed to comport with the requirements of fair procedure.

dollars. Two members subsequently paid their fines; the four petitioners refused, and filed unfair labor practice charges instead. On October 2, 1961, the Union filed suit in a Wisconsin State court to collect the amounts assessed, and that lawsuit is still pending (R.A. 37-38; Pet. App. 17a). No action has been taken or threatened by the Union that would impair petitioners' employment status. (Pet. App. 17a).

Upon the above facts, the Board concluded that the Union had not violated Section 8(b)(1)(A) and dismissed the complaint. Agreeing with the Trial Examiner, the Board held that Congress did not intend by that Section to prohibit the type of union program here involved (Pet. App. 6a).

The court of appeals sustained the Board's findings and conclusions and denied the petition for review (Pet. App. 3a-12a).

ARGUMENT

The decision of the court of appeals is correct, acgords with recent decisions of this Court, and does not conflict with the decision of any other circuit. Thus, even apart from the untimeliness of the petition, further review would not be warranted.

1. This Court has recently established two major "guideposts" (Pet. 11) for ascertaining the relationship between Section 8(b)(1)(A) and union discipline. In National Labor Relations Board v. Allis-Chalmers Mfg. Co., 388 U.S. 175, the Court held that that Section does not prohibit a union from fining members who cross an authorized picket line in order

to work during a strike; and in National Labor Relations Board v. Industrial Union of Marine & Shipbuilding Workers, No. 796, 1967 Term, decided May 27, 1968, the Court ruled that that Section prohibits union discipline of a member for filing charges with the Board in violation of a union policy requiring prior exhaustion of union remedies. The Court itself harmonized these results—as had the Board, whose decisions were upheld in both cases—by referring to the legitimacy of the union policy sought to be enforced:

Thus, § 8(b) (1) (A) assures a union freedom of self-regulation where its legitimate internal affairs are concerned. But where a union rule penalizes a member for filing an unfair labor practice charge with the Board, other considerations of public policy come into play, * * * [particularly] the overriding public interests * * [in] unimpeded access to the Board * * * . [Industrial Union, supra, slip op. pp. 5-6.]

In this case, the court of appeals properly concluded that the Allis-Chalmers guidepost more appopriately applies to the situation at bar (Pet. App. 6a) because the union fines here involved were reasonably aimed at achieving "a legitimate union objective" (Pet. App. 10a). The court below distinguished the type of discipline involved in Industrial Union on the ground, shortly thereafter adopted by this Court in that case, that the union rule there offended strong policy considerations not at stake here (Pet. App. 12a). The undisputed facts of the present case demonstrate the soundness of the decision below.

The union rule in this case limits the amount of incentive pay a member may earn but does not limit his productivity. As the Board—whose factual determinations were approved by the court of appeals—explained (Pet. App. 15a):

The Union does not require that the member cease production when he has attained the ceiling rate for the day; he may continue working, but, in order to comply with the rule, he must not report, for credit toward his earnings, any items produced in excess of the amount permitted to be earned under the production quotas. He must, by a bookkeeping entry, "bank" this production for later payment. An employee may draw on his "bank" * * * for example, when he is sick and unable to work, or his machine is out of order. * * *

Although the Union's interest in protecting 'its members against the abuses of incentive pay systems (see R.A. 107-108) may not be as critical as its interest in preserving solidarity during a strike, the problem of productivity levels is nonetheless one of legitimate and historical union concern (Pet. App. 8a-10a). The union rule in this case is, as it declares on its face, designed "to protect members of the Union in their employment and to give them as much security as the industry can provide" (R.A. 34; p. 5, supra). Moreover, the rule was carefully tailored so as to minimize the impact on the employee's legitimate interests. As the court below noted (Pet. App. 10a-11a), this rule is less severe in its economic impact on members than the rule held enforceable by this Court in Allis-Chalmers. As we have seen petitioners were not precladed from producing in excess of quota; this rule merely restricted their opportunity to demand immediate compensation for the excess work, requiring them instead to bank it for a "rainy day."

Moreover, although the Company does not consider itself bound by the rule, it has, as the Board found (Pet. App. 16a), nevertheless "accepted the ceilings as an integral part of the modus operandi and has recognized the ceilings as forming an important element of its negotiated wage structure." (See, also, note 6, supra, p. 6). Thus, as the Board added (Pet. App. 16a), "the Company has never sought to discipline any of the employees for adherence to the Union's ceiling restrictions"; the Company "uses the ceilings in computing wages and evaluating jobs"; ceilings have also played a "role in the negotiation of collective-bargaining agreements between the Company and the Union"; and "the Company voluntarily aids and cooperates with the Union in the administration of the rule" by making the necessary bookkeeping entries for the "banking" procedures, permitting the ceilings to be posted on its bulletin boards, and permitting Union stewards to inspect the employees' production records on company time and without loss of pay.

In these circumstances, here, no less than in Allis-Chalmers, it was within the competence of the Union to decide that the interests of its members were best served by a deferred compensation rule, and to require employees who elected to become members of the Union to adhere to that rule. Similarly, here, no less than in Allis-Chalmers, the Union could, without running afoul of Section 8(b) (1) (A), impose reasonable

discipline on members violating that rule. Since the fines imposed were no greater than those involved in *Allis-Chalmers*, and since no attempt was made to affect the members' job rights, the discipline here did not exceed permissible limits.

Petitioners' contention (Pet. 6-9) that this case involves a union rule which derogates from the collective bargaining process as contemplated by the Act, and therefore violates public policy in a manner akin to the rule involved in *Industrial Union*, is wide of the mark. The Union's rule here does not restrict production as such; in view of the Company's traditional acquiescence in its operation, the Board and the court of appeals properly refused to equate the rule with slowdowns and other interferences with established employer production norms which might be regarded as a unilateral effort to establish terms and conditions of employment (Pet. App 12a). 10

¹⁰ Thus, Associated Home Builders v. National Labor Relations Board, 352 F. 2d 745 (C.A. 9), is quite distinguishable. There the court, while reserving the question whether Section 8(b) (1) (A) was violated, suggested that the union had violated its bargaining duty by fining members to enforce a production ceiling which had been unilaterally established by the union and was directly contrary to the provisions of the negotiated bargaining agreement (352 F. 2d at 751).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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ARNOLD ORDMAN, General Counsel.

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NORTON J. COME,
Assistant General Counsel.

GARY GREEN,

Attorney.

National Labor Relations Board.

AUGUST 1968.

APPENDIX

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Chicago, Illinois 60604 Tuesday, March 5, 1968

BEFORE

HON. WIN G. KNOCH, Senior Circuit Judge HON. LUTHER M. SWYGERT, Circuit Judge HON. WALTER J. CUMMINGS, Circuit Judge

No. 14698

RUSSELL SCOFIELD, LAWRENCE HANSEN, EMIL STEPANEC and GEORGE KOZBIEL, PETITIONERS

22

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

Petition for Review of an Order of the National Labor Relations Board

This cause came on to be heard on the petition for review of an order of the National Labor Relations Board and the record from the National Labor Relations Board, and was argued by counsel.

On consideration whereof, it is ordered by this Court that the petition to review and set aside the order of the National Labor Relations Board dated May 18, 1964, denying the motion of the petitioners for reconsideration of the decision and order of the National Labor Relations Board dated January 17, 1964, be, and the same is hereby DENIED in accordance with the opinion of this Court filed this day; and

upon presentation, an appropriate decree will be entered.

A True Copy:

Teste:

/s/ Thomas F. Strubbe, Chief Deputy
Clerk of the United States Court of Appeals
for the Seventh Circuit





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. IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1968

No. 273

RUSSELL SCOFIELD, LAWRENCE HANSEN, EMIL STEFANEC, and GEORGE KOZBIEL, Petitioners.

US.

NATIONAL LABOR RELATIONS BOARD and INTERNATIONAL UNION, UAW-AFL-CIO, Respondents.

REPLY BRIEF OF PETITIONERS IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

JAMES URDAN,
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SUPREME COURT OF THE UNITED STATES

October Term, 1968

No. 273

RUSSELL SCOFIELD, LAWRENCE HANSEN, EMIL STEFANEC, and GEORGE KOZBIEL,

Petitioners.

125

NATIONAL LABOR RELATIONS BOARD and INTERNATIONAL UNION, UAW-AFL-CIO, Respondents.

REPLY BRIEF OF PETITIONERS IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The purpose of this reply brief is to respond to the argument of the respondents that the petition herein is out of time under 28 USC 2101(c) such that this Court lacks jurisdiction. The applicable statute provides as follows:

"Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days,"

Under the statute the ninety-day period for applying for the writ of certiorari commences "after the entry of such judgment or decree". The decree of the Court of Appeals was entered April 16, 1968. (App. p. 1a.) The petition herein was filed within ninety days thereafter. The petition was timely.

Respondents argue that an order of the Court dated March 5, 1968 (App. p. 3a) should be regarded as the entry of the judgment or decree within the meaning of the statute. Such order was neither a judgment nor a decree but rather an order that a decree be entered at a subsequent time. The order was clearly intended to be tentative for it states:

"... upon presentation, an appropriate decree will be entered." (Emphasis supplied)

An order directing judgment is neither a judgment nor a decree. As a general rule such an order does not even provide a basis for an appeal.¹

The order of March 5 did not constitute the entry of a judgment or decree within the meaning of the statute.

Rule 14(1) of the Court of Appeals established a procedure for the entry of a decree enforcing the order of an administrative agency. That rule was applicable

¹"In the absence of specific statutory authority, it has generally been held that an order for judgment, that is, an order directing the entry of a formal judgment, does not support an appeal." 73 ALR 2d 250, 296-297.

The rule provides: "Preparation of Decrees Enforcing Orders; Settlement; Entry. When an opinion of this court is filed directing the entry of a decree enforcing in whole or in part the order of an administrative agency, board, commission, or officer and the court has not entered the decree, the

here. It is not relevant that the proceeding in the Court of Appeals was a petition for review rather than an enforcement proceeding as such. The effect of the action of the court was to enforce the order of the agency.

It is clear that both the court and the parties were proceeding under the foregoing rule in preparing and entering the decree in this case. The order of March 5, 1968 expressly directed the subsequent entry of a decree. It did not itself use the language appropriate to a judgment or decree. The existence of the order was not communicated to the parties by the court or the clerk.

Subsequently counsel for the Board forwarded to the court a proposed decree. The covering letter on its face concedes that no decree had yet been entered. (App. p. 4a) The clerk then transmitted the draft decree to counsel for the petitioners as contemplated by Rule 14(1). (App. p. 6a) Thereafter under date of April 16 the clerk notified the parties that the final decree was "entered" by the court on April 16, 1968. (App. p. 7a) The final decree of April 16 used language appropriate to a judgment and was formally signed by the three judge panel of the court. (App. p. 2a)

agency, board, commission, or officer concerned shall within 10 days serve upon the opposing party and file with the clerk a proposed decree in conformity with the opinion. If the opposing party objects to the proposed decree as not in conformity with the opinion he shall within 5 days thereafter serve upon the agency, board, commission, or officer concerned and file with the clerk a proposed decree which he deems to be in conformity with the opinion. The court will thereupon settle and enter the decree without further hearing or argument."

^aSection 10(f) of the National Labor Relations Act dealing with review proceedings authorizes the Court of Appeals "to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board" the same as in the case of an application by the Board for enforcement of its order under Section 10(e).

The statutory period runs from the date of "entry of such judgment or decree". The foregoing sequence of events can leave no doubts that that date was April 16, 1968.

A directly comparable authority is Rubber Company v. Goodyear, 73 U.S. (6 Wall.) 153. In that case the lower court had entered an order resolving the issues. A week later a final decree was filed and entered virtually duplicating the previous order. This Court held that the formal decree rather than the prior order governed the time for appeal.

The cases relied upon by the respondents are readily distinguishable. In both FTC v. Colgate-Palmolive Co., 380 U.S. 374 and U.S. v. Adams, 383 U.S. 39 the petitions were found to be timely. Both cases involved a situation where the lower court had admittedly entered a judgment and the sole question presented was whether the failure to petition after such judgment precluded a petition subsequent to a revised judgment. Neither case involved the issue presented here; i.e., the determination of the date of entry of the original judgment or decree of the court. Department of Banking of Nebraska v. Pink, 317 U.S. 264 and Cole v. Violette, 319 U.S. 581

"Upon these facts we cannot doubt that the entry of the 28th of November was intended as an order settling the terms of the decree to be entered thereafter; and that the entry made on the 5th of December was regarded both by the court and the counsel as the final decree in the cause.

"We do not question that the first entry had all the essential elements of a final decree, and if it had been followed by no other action of the court, might very properly have been treated as such. But we must be governed by the obvious intent of the Circuit Court, apparent on the face of the proceedings, We must hold, therefore, the decree of the 5th of December to be the final decree." 73 U.S. (6 Wall.) at 155-156.

See also Puget Sound Power & Light Co. v. County of King, 264 U.S. 22; U.S. v. Gomez, 68 U.S. (1 Wall.) 690; Commissioner v. Estate of Bedford, 325 U.S. 283; and U.S. v. Hark, 320 U.S. 531.

The court said:

are similar cases in which a state appellate court had taken final action and the sole issue was whether a slight subsequent modification which did not change the substance of the prior action would extend the applicable time limits. By contrast here, the decree of the Circuit Court was first entered within the meaning of the statute on April 16, 1968. No question of a subsequent modification is involved.

The new Federal Rules of Appellate Procedure which were effective July 1, 1968 substantially clarify and formalize the procedures in question here. Particularly pertinent will be Rule 36 which specifically defines the concept of entry of judgment. Most important, both Rules 36 and 45 (c) require the clerk to notify each of the parties of the entry of a judgment thus eliminating the likelihood of ambiguity or unfairness in measuring time limits.

The issue of timeliness presented by the present petition is not likely to arise under the new rules. Thus there is no continuing policy to be served by questioning the procedures followed here. The obvious intention of the court below, confirmed by the actions of the clerk and the parties, to frame a decree for formal "entry" subsequent to the opinion date should be given controlling effect. It would be a manifest injustice to these petitioners if the timeliness of the present petition were to be denied upon the technical grounds advanced by the respondents.

The petition herein was timely and should be considered on its merits. For the reasons set forth in the petition, the petition for certiorari should be granted.

Respectfully submitted,

JAMES URDAN,
Attorney for Petitioners

QUARLES, HERRIOTT, CLEMONS, TESCHNER & NOELKE 411 East Mason Street Milwaukee, Wisconsin 53202

by the respondents to be the measuring date, petitioners filed with this Court an application for an extension of time within which to file a petition for a writ of certiorari. Such application clearly disclosed that the petitioners considered July 15, 1968 to be the then time limit and the application sought an extension to September 1, 1968. At that time neither respondent raised an issue as to the time limit. The application for extension of time was denied. Petitioners submit that if the issue had been raised at that time different considerations would have governed the decision of the Court with respect to the application for extension of time.

APPENDIX

DECREE

IN THE

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

RUSSELL SCOFIELD, LAWRENCE HANSEN, EMIL STEFANEC, GEORGE KOZBIEL,

· Petitioners.

April 16, 1968 No. 14,698

NATIONAL LABOR RELATIONS BOARD,

Respondent.

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, AFL-CIO, Intervenors.

Before KNOCH, Senior Circuit Judge, and SWYGERT and CUMMINGS, Circuit Judges.

THIS CAUSE came on before the Court upon a petition to review and set aside an order of the National Labor Relations Board, dated January 17, 1964, dismissing a complaint against Local 283, United Automobile, Aircraft and Agricultural Implement Workers of America, UAW-AFL-CIO, in Board Case No. 13-CB-1059-1, 13-CB-1059-2, 13-CB-1059-3 and 13-CB-1059-4. The Court heard argument of respective counsel on January 17, 1968, and has considered the briefs and transcript of record filed in this cause. On March 5,

1968, the Court being fully advised in the premises handed down its opinion denying the petition to review. In conformity therewith it is

ORDERED, ADJUDGED AND DECREED by the United States Court of Appeals for the Seventh Circuit that the petition to review an order of the National Labor Relations Board dated January 17, 1964, dismissing a complaint against Local 283, United Automobile, Aircraft and Agricultural Implement Workers of America, UAW-AFL-CIO, in the above matter, be and it hereby is denied.

WIN G. KNOCH

Judge, United States Court of Appeals
for the Seventh Circuit

LUTHER M. SWYGERT
Judge, United States Court of Appeals
for the Seventh Circuit

WALTER J. CUMMINGS
Judge, United States Court of Appeals
for the Seventh Circuit

A True Copy: Teste:

KENNETH J. CARRICK Clerk of the United States Court of Appeals for the Seventh Circuit.

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

Chicago, Illinois 60604

Tuesday, March 5, 1968

BEFORE

HON. WIN G. KNOCH, Senior Circuit Judge HON. LUTHER M. SWYGERT, Circuit Judge HON. WALTER J. CUMMINGS, Circuit Judge

No. 14698

RUSSELL SCOFIELD, LAWRENCE HANSEN, EMIL STEPANEC and GEORGE KOZBIEL, PETITIONERS

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

Petition for Review of an Order of the National Labor Relations Board

This cause came on to be heard on the petition for review of an order of the National Labor Relations Board and the record from the National Labor Relations Board, and was argued by counsel.

On consideration whereof, it is ordered by this Court that the petition to review and set aside the order of the National Labor Relations Board dated May 18, 1964, denying the motion of the petitioners for reconsideration of the decision and order of the National Labor Relations Board dated January 17, 1964, be, and the same is hereby DENIED in accordance with the opinion of this Court

filed this day; and upon presentation, an appropriate decree will be entered.

A True Copy:

Teste:

/s/ Thomas F. Strubbe, Chief Deputy
Clerk of the United States Court of Appeals
for the Seventh Circuit

NATIONAL LABOR RELATIONS BOARD

OFFICE OF THE GENERAL COUNSEL

Washington, D.C. 20570

April 3, 1968

Kenneth J. Carrick, Esquire Clerk, United States Court of Appeals for the Seventh Circuit 1212 Lake Shore Drive Chicago 10, Illinois

> Re: No. 14698, Russell Scofield, Lawrence Hansen, Emil Stefanec, George Kozbeil v. N.L.R.B.

Dear Mr. Carrick:

We are enclosing eight mimeographed copies of the Board's proposed decree in the above-entitled matter. After entry of the decree by the Court we would appreciate your returning one certified copy thereof to this

office, and sending another certified copy to the Regional Director whose name and address are listed below.

Certificate of service is also enclosed.

Very truly yours, &

Marcel Mallet-Prevost
Assistant General Counsel

cc & documents to:

Ross M. Madden, Director Region 13, N.L.R.B. 881 U. S. Courthouse & F. O. B. 219 South Dearborn Street Chicago, Illinois 60604

Quarles, Herriott & Clemons, Att: John G. Kamps & James Urdan, Esqs. 411 East Mason Street Milwaukee, Wisconsin 53202

Joseph L. Rauh, Jr. 1625 K Street, N.W. Washington, D. C. (6)

Stephen I. Schlossberg 8000 East Jefferson Avenue Detroit, Michigan 48214

Harold A. Katz 7 South Dearborn Street Chicago, Illinois 60603 United States Court of Appeals
For the Seventh Circuit
219 South Dearborn Street
Chicago, Illinois 60604

Kenneth J. Carrick Clerk

April 8, 1968

Mr. James Urdan Attorney at Law 411 East Mason Street Milwaukee, Wisconsin

> Re: Russell Scofield, et al. v. National Labor Relations Board, No. 14698

Dear Mr. Urdan:

The National Labor Relations Board has submitted a draft of a decree, which they suggest is in conformity with this Court's opinion in the above entitled cause.

Enclosed is the draft decree, which you may approve as to form in writing on the draft and returning it to me for presentation to the Court. If you believe that it is not in conformity with the Court's opinion, you may return the draft to me with an original and four copies of your suggestions in opposition by Tuesday, April 16, 1968.

Very truly yours,

Kenneth J. Carrick, Clerk

KJC: hm Enc. United States Court of Appeals
For the Seventh District
219 South Dearborn Street
Chicago, Illinois 60604

Kenneth J. Carrick Clerk

April 16, 1968

National Labor Relations Board Washington, D. C.

James Urdan, Esq. 411 E. Mason Street Milwaukee, Wisconsin

Marcel Mallet-Prevost
Assistant General Counsel
National Labor Relations Board
Washington, D. C.

Joseph L. Rauh, Jr., Esq. 1625 K Street, N.W. Washington, D. C.

Harold A. Katz, Esq. 7 So. Dearborn Street Chicago, Illinois

Philip L. Padden, Esq. 606 W. Wisconsin Avenue Milwaukee, Wisconsin

Re: Russell Scofield, et al., Petitioners v. National Labor Relations Board, Respondent International Union, United Automomobile, Aerospace and Agricultural Implement Workers of America, AFL-CIO, Intervenors

No. 14698

Gentlemen:

Enclosed is certified copy of the final decree entered by this Court on April 16, 1968, in the above entitled cause.

> Very truly yours, Kenneth J. Carrick, Clerk



SUPREME COURT. D. B.

No. 273

Office Supreme Court, U.S. F I L. E D

AUG 29 1968

JOHN F. DAVIS, CLERK

In the

Supreme Court of the United States

OCTOBER TERM, 1968

RUSSELL SCOFIELD, LAWRENCE HANSEN, EMIL STEFANEC, and GEORGE KOZBIEL,

Petitioners,

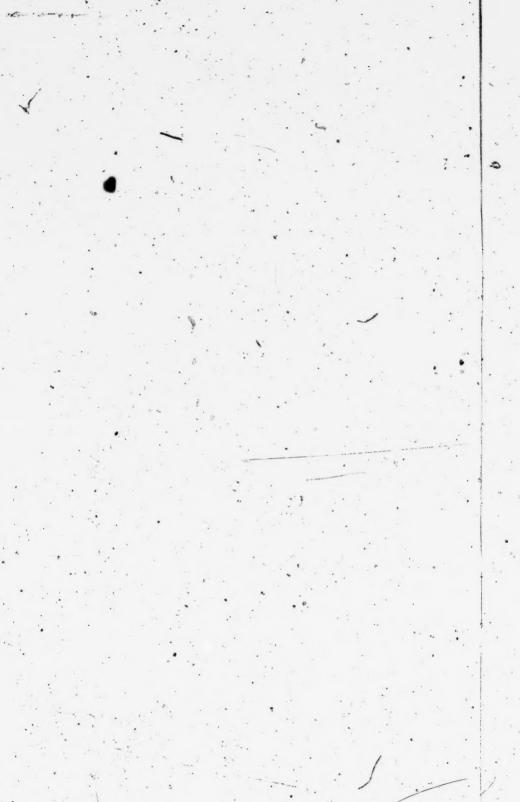
VB.

NATIONAL LABOR RELATIONS BOARD and INTERNATIONAL UNION, UAW-AFL-CIO,

Respondents.

BRIEF AMICI CURIAE OF WISCONSIN MANUFAC-TURERS' ASSOCIATION AND EMPLOYERS' ASSO-CIATION IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

WALTER S. DAVIS
324 East Wisconsin Avenue
Milwaukee, Wisconsin 53202
Counsel



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In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 273

RUSSELL SCOFIELD, LAWRENCE HANSEN, EMIL STEFANEC, and GEORGE KOZBIEL,

Petitioners,

VS

NATIONAL LABOR RELATIONS BOARD and INTERNATIONAL UNION, UAW-AFL-CIO,

Respondents.

BRIEF AMICI CURIAE OF WISCONSIN MANUFAC-TURERS' ASSOCIATION AND EMPLOYERS' ASSO-CIATION IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

With consent of the parties, the Wisconsin Manufacturers' Association and the Employers' Association respectfully submit this brief as amici curiae in support of the Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

INTEREST OF THE AMICI CURIAE

The Wisconsin Manufacturers' Association (WMA) is a voluntary association of manufacturing enterprises with operations in Wisconsin. It was founded in 1911 and is now constituted of over 1300 member-enterprises employing over 450,000 people. This constitutes approximately 85% of all those employed in manufacturing in Wisconsin. The average number of employees per member of the association is under 100.

Since its founding, WMA has represented Wisconsin industries in obtaining equitable rail, air, mail and shipping rates, fair consideration on unemployment and workmen's compensation, taxes, wages and hours and labor-management legislation.

The Employers' Association is a voluntary association of Wisconsin business firms operating in eight (8) southeastern Wisconsin counties. It includes companies engaged in manufacturing, processing, distribution, banking, insurance, and graphic arts, as well as service organizations and institutions such as hospitals and nursing homes. It was organized in 1935, and stems from an earlier group founded in 1901. About 480 businesses comprise its present membership.

The Employers' Association is a working business organization staffed to provide services to members in the broad field of employee relations. It originates, or secures data, and offers counseling and training for self-improvement in management skills. Though not directly affiliated with other organizations, the Employers' Association works closely with various national, state and local employment groups.

The interest of the WMA and the Employers' Association in the petition sub judice stems not only from the natural interest provoked by reason of a question concerning the interpretation of a member's collective bargaining agreement but from their long time interest in labormanagement affairs, and especially in the protection of the rights of individual employees under Section VII of the National Labor Relations Act, as amended (49 Stat. 449, 61 Stat. 136, 29 USC Section 151 et seq.), and the preservation of the principle of collective bargaining. The fines involved here have been the subject of many discussions, quite often with the mention of Wisconsin industry. The interest of amici here is to assist in righting an error in the administration of the Act which has become manifest in these long proceedings. The effect of such error, if allowed to stand, would be so far-reaching that the attendant evil will undoubtedly cause a regression in the effectiveness of the collective bargaining process and the creation of a series of acrimonious labor-management disputes for years to come.

After an extended hearing and review, the National Labor Relations Board held, member Leedom dissenting, that the fines here imposed by the Union on employees who had violated the Union's production ceiling were not violative of Section 8(b)(1)(A) of the Act. That decision is reported at 145 NLRB 1097.

Upon a petition for review to the Court of Appeals for the Seventh Circuit, that Court, Judge Knoch dissenting, denied review of the Board's findings. That decision is reported at 393 F(2d) 49. The Petition for a Writ of Certiorari was filed July 6, 1968, presenting the question:

Whether a Union restrains or coerces an employee in the exercise of a right guaranteed by Section 7 of the National Labor Relations Act, in violation of Section 8(b)(1)(A), of the Act, when the Union fines an employee, and attempts to collect such fine by Court action, because the employee performed work and earned wages in excess of certain production quotas established and enforced by the Union.

This brief amici curiae is addressed to the question and emphasizes from the objective views of industry in general, rather than the partisan views of the parties litigant, what are considered the errors in the decision below.

ARGUMENT

A. Clarification of Question.

It should be noted at the outset that the Petitionersemployees and the Respondent-NLRB fundamentally agree on the important question to be resolved by this record. However, the NLRB in its answer to the petition introduces the additional facet to the issue that the employer here had "acquiesced" in the union-established production ceilings. (Respt. Br., p. 3) This concept of the record runs through the majority opinion of the Court below and is embellished by the additional claim that the unionimposed production ceilings were "established by collective bargaining." 393 F. (2d), at 53.

The record facts disclose that through several negotiations the employer took cognizance of the peripheral fact that the union had imposed production ceilings which, if exceeded, a union member was required to "bank," or be subject to union discipline. From this fact, however, it cannot be said that the employer "acquiesced" in the establishment of the union production ceilings. In fact, it is undisputed that heretofore, whenever an employee chose to ignore the union-imposed production ceilings and "banking" requirements, the employer paid the employee for his entire production in full. 145 NLRB at pp. 1098, 1117. Accordingly, it can just as fairly be said that the union "acquiesced" in the violation of its by-laws by not demanding and receiving from the employer a covenant in the collective bargaining agreement to the effect that the employer would not pay employees who refused to "bank" production in excess of the union-established ceiling.

It is submitted that the reconciliation of the two conflicting fundamental policies is in no way hastened by a claim that the employer acquiesced in or jointly sponsored a rule which permitted the union to discipline its members. Elementally, the issue to be resolved is:

Does a union violate §8(b)(1)(A) of the Act when it threatens to impose a fine upon a member for violating a union-established production ceiling where the employee seeks to take the full benefit negotiated for him in the collective bargaining agreement?

It has been repeatedly stated that the Act is not intended to regulate "the legitimate internal affairs of the union." See, e.g., NLRB v. Allis Chalmers Mfg. Co., 388 U.S. 175. On the other hand, this black letter rule of substantive construction gives way when "overriding public interests" are involved. NLRB v. Industrial Union of Marine & Shipbuilding Workers, U.S., 88 S.Ct. 1717.

Congress has enunciated its policy of sanctioning, fostering and protecting collective bargaining as the method for eliminating obstructions to the full flow of interstate commerce. Act, §1. It is submitted that this core policy must override the right of unions to manage their internal affairs if there is a conflict between the two.

B. Importance of Question Presented.

This case presents this Court with an unusual opportunity to elaborate upon, define and reconcile several conflicting, basic policies involved in the administration in the Act, thereby assisting in the furtherance of its purposes.

1. This Court held at an early date that Congress had chosen collective bargaining as the exclusive vehicle for resolution of labor-management relationships. See, NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1. Through

this process labor and management are to establish "their own charter for the ordering of industrial relations." Local 24, Teamsters v. Oliver, 358 U.S. 783. So strong was the policy of Congress, this Court held that no individually-negotiated contracts—even those in effect at the inception of the Act—could deprive employees of their guaranteed rights to collective bargaining; that collective bargaining was the exclusive method and all other methods must give way by reason of the announced policy of Congress. J. I. Case Company v. NLRB, 321 U.S. 332.

The decision below raises the question as to whether wages and conditions of employment shall continue to be negotiated exclusively under the collective bargaining process, OR whether important facets of wages and conditions of employment may now be regulated by union by-laws in direct conflict to the terms set forth in the bargaining agreement.

2. This Court and the various Courts of Appeal have held in a line of cases that rights and benefits negotiated for employees and solemnized in collective bargaining agreements cannot be negated by the action or inaction of either the union or the employer or the two acting in concert. Thus, an employee's negotiated seniority status cannot be waived, ignored, denied or bargained away by a union even in concert with an employer because the employee as a union member had violated union by-laws. NLRB v. IBT, 347 U.S. 17. See also, e.g., St. Johnsbury Co., Inc., (1958) 120 NLRB 636; Minneapolis Star & Tribune Co., (1954) 109 NLRB 727.

Similarly, this Court has held, after exhaustive review of its prior holdings to the *contra*, that employees are entitled to enforce benefits obtained for themselves under collective bargaining agreements. It has been said that to deny employees this right of enforcement "would stultify

the Congressional policy of having the administration of collective bargaining contracts accomplished under a uniform body of federal substantive law." Smith v. Evening News Association, 371 U.S. 195.

The decision below raises the dilemma as to whether the substance and stature of a collective bargaining agreement shall continue to give employees enforceable rights, the full negotiated benefits, and thereby further Congressional aims, OR whether employee rights under collective bargaining agreements can be effectively quashed by the collateral enforcement of a union by-law negating those rights.

3. This Court has earlier held that whether a union has a secret strike ballot or not is not a mandatory subject of bargaining, as such matter deals "only with relations between the employees and their unions"—i.e., internal affairs. NLRB v. Wooster Division of Borg Warner, 356 U.S. 342. Yet, the Court below has held that the employer "can require the Union to bargain over a demand to give up its ceiling rule," 393 F.(2d), at p. 54, and at the same time held that \$8(b)(1)(A) does not "encompass internal affairs of unions," id. at p. 52, relying upon NLRB v. Allis Chalmers Mfg. Co., 388 U.S. 175.

Thus, this case raises the question as to whether the internal affairs of a union are to continue to remain beyond the scope of mandatory collective bargaining OR whether an employer can now insist on bargaining over the internal affairs of unions. This statement of the plain conflict of the rationale of the decision below and Borg Warner points out the unchartered and directionless voyage upon which unions and employers have been launched. And the utter impracticality of urging employers to commence negotiating on the internal regulation of unions is demonstrated in a case such as this where both the union "crime" and the amount of the fine is fixed by an International Union

constitution over which the bargaining agent — the local union — has virtually no power to amend. See, 145 NLRB, at p. 1116, fn. 11. If the principle of bargaining over internal union affairs remains established by the decision below, what is to prevent an employer from demanding to bargain over the amount of dues the union will be permitted to charge its employees?

4. The decision below is premised on two erroneous conclusions: that production ceilings are a "legitimate union objective," and that the by-law creating the mechanics for imposing discipline is purely an internal affair. NLRB v. Industrial Union, supra, emphasizes that §8(b) (1)(A) assures a union "freedom of self regulation where its legitimate internal affairs are concerned." The lower court, as did the Board, relied upon 60 years of traditional opposition to piecework and the imposition of limits by some unions for some 20 years in holding that production ceilings were "legitimate union objectives." It is respectfully submitted that while the history cannot be denied, the real question is whether some general history - much of it antedating the Congressional policy of establishing collective bargaining as the exclusive means of chartering relationships between management and labor - makes the establishment of production ceilings outside the collective bargaining agreement a legitimate objective. Is it not more consistent to say that production ceilings are directly related to wages and conditions of employment and therefore, if production ceilings are to be imposed and enforced, they must be incorporated into the collective bargaining agreement?

Secondly, since production ceilings are so directly related to wages and conditions of employment, they cannot be said to be the "internal affair" of a union. Not being strictly an internal union affairs, the prohibition of §8(b) (1)(A) is not to be avoided under the facts of this case.

Allis Chalmers, supra, may quite legitimately hold that union solidarity during a strike is a "legitimate internal affair." In such a case no collective bargaining agreement is in effect. No benefit of a collective bargaining agreement is being negated by the enforcement of union discipline. No wages or conditions of employment are being affected by discouraging a break in the strike ranks by fines, for the union in such circumstances is using the strike and the solidarity of the strike legitimately to affect wages and conditions of employment. Here, the discipline is being used as the method itself to affect wages and conditions of employment and in absolute negation of what is established in the labor agreement.

CONCLUSION

Whether the ambit of §8(b)(1)(A) is proscribed by the internal affairs doctrine under the facts presented here is an important issue to be resolved. It is submitted that the selection by Congress of collective bargaining as the exclusive method for fixing the relationships between labor and management is a keystone policy determination. The Board and the courts have consistently and continually enhanced the stature of the offspring of this method — the collective bargaining agreement. Benefits in wages, hours and terms and conditions of employment set forth in such agreements cannot be negated by the imposition of union discipline under the guise that it is the mere management of internal affairs. Union internal regulation of its members ceases to be internal when it touches upon the major focus of the negotiation and administration of collective bargaining contracts. If union regulation of its members

affects the terms and conditions of their employment, it is no longer a legitimate regulation of purely internal affairs. Unless the decision below is reviewed and reversed in accordance with the foregoing rationale, substantial rights of employees will be negated by so-called union internal regulation. Accordingly, it is respectfully submitted that the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

Walter S. Davis
Counsel for Wisconsin Manufacturers'
Association and Employers' Association

324 East Wisconsin Avenue Milwaukee, Wisconsin 53202



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JOHN F. BAVOR, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1968

No. 273

RUSSELL SCOFIELD, LAWRENCE HANSEN, EMIL STEFANEC, and GEORGE KOZBIEL, Petitioners,

w.

NATIONAL LABOR RELATIONS BOARD and INTERNATIONAL UNION, UAW-AFL-CIO, Respondents.

BRIEF FOR PETITIONERS

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411 E. Mason Street
Milwaukee, Wisconsin 53202



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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1968

No. 273

RUSSELL SCOFIELD, LAWRENCE HANSEN, EMIL STEFANEC, and GEORGE KOZBIEL, Petitioners,

US.

NATIONAL LABOR RELATIONS BOARD and INTERNATIONAL UNION, UAW-AFL-CIO, Respondents.

BRIEF FOR PETITIONERS

OPINIONS BELOW .

The opinion of the Court of Appeals (A. 151) is reported at 393 Fed.2d 49. The decision and order of the Board (A. 125) are reported at 145 N.L.R.B. 1097.

JURISDICTION

The jurisdiction of this court is invoked under 28 U.S.C. §1254(1) and §10(e) of the National Labor Relations Act, as amended, 29 U.S.C. §160(e). The decree of the Court of Appeals was entered on April 16, 1968. The petition for a writ of certiorari was docketed in this Court on July 6, 1968.

¹This case was previously before this Court with respect to the issue of the right of the union to intervene in the proceedings before the Court of Appeals. The opinion on that issue is reported at 382 U.S. 205. That issue is not involved here.

rights. Such a view cannot be sustained. It is established that §8(b)(1)(A) protects union members against union coercion as well as it protects nonmembers. Radio Officers v. Labor Board, 347 U.S. 17; N.L.R.B. v. Industrial Union of Marine & Shipbuilding Workers, A.F.L.-C.I.O., 391 U.S. 418. Such a waiver theory would be particularly inappropriate where, as here, the membership of the employee in the union is colored by the fact that he is compelled under the applicable collective bargaining agreement to pay dues or the equivalent of dues to the union whether or not he joins.

The violation here is apparent upon the face of the statute. That §8(b) (1) (A) may properly be applied to union fines and even expulsion is established by the Marine Workers case as well as Board decisions such as Local 138, International Union of Operating Engineers (Charles S. Skura), 148 N.L.R.B. 679. The statute should be so applied here.

Such a result would not be inconsistent with the Allis-Chalmers decision. In its broadest sense the majority opinion in the Allis-Chalmers case upheld the union fines only because they were seen to aid and further the proper collective bargaining function of the union there. The approach of the Allis-Chalmers majority establishes the prime importance of collective bargaining as the basic policy of the Act. It thus follows that union fines of the type here must be condemned, since they have the effect of weakening and bypassing the collective bargaining process. The fines here must be found to constitute unfair labor practices.

A question has been raised as to the timely filing of the petition for writ of certiorari. The applicable statute, 28 U.S.C. 2101(c), requires that the petition be filed within

ninety days "after the entry of [the] judgment or decree". The decree here was entered by the Court of Appeals on April 16, 1968, and the petition was filed within ninety days thereafter on July 6, 1968. A prior order of the Court of Appeals on March 5, 1968, was by its terms tentative and contemplated the later entry of the decree. This prior order did not constitute the entry of a judgment or decree within the meaning of the statute. The petition was timely.

ARGUMENT:

 The Union Fines Here Constitute an Unfair Labor Practice Under Section 8(b)(1)(A) of the Act.

The rights stated in §7 of the National Labor Relations Act are the core of the Act. Employees are guaranteed certain rights to engage in concerted activities and, most important, are also guaranteed "the right to refrain from any or all of such activities."

Neither the Board nor the Court below questioned that the employees here, by refusing to engage in the union production limitation, were exercising their protected rights under §7. This issue had been settled by an earlier Board decision, *Printz Leather Go., Inc.*, 94 N.L.R.B. 1312. In that case an unfair labor practice was found where employees were coerced in the enforcement of a union production ceiling rule. The illegal restraint and coercion in that case did not take the form of union fines, but the identical §7 right was involved.

Section 8(b) (1) (A) of the Act makes it an unfair labor practice for a labor organization to restrain or coerce employees in the exercise of the rights guaranteed in §7. There can be no question that union discipline is coercive in fact. Cf. concurring opinion of Mr. Justice White in

STATUTES INVOLVED

National Labor Relations Act (61 Stat. 136, 29 U.S.C. §151 et seq.)

- Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities. . . .
- Sec. 8. (b) It shall be an unfair labor practice for a labor organization or its agents—
- (1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: Provided, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein;

Other relevant portions of the National Labor Relations Act are set forth in the Appendix hereto. The portion of the argument below relating to the jurisdictional issue sets forth the relevant provision of the Judicial Code.

QUESTIONS PRESENTED

- 1. Whether a union restrains or coerces an employee in the exercise of a right guaranteed by §7 of the National Labor Relations Act, in violation of §8(b)(1)(A), when the union fines the employee, and attempts to collect such fine by court action, because the employee performed work and earned wages in excess of certain production quotas established and enforced by the union.
- 2. Whether the petition for writ of certiorari was timely filed.

STATEMENT OF THE CASE

The facts are fully set forth in the decision of the Board. (A. 125) The essential facts are few and undisputed.

The union has been the collective bargaining representative of the employees of Wisconsin Motor Corporation in Milwaukee, Wisconsin since 1937. Under the collective bargaining agreement in force at the time this dispute arose, employees of the company were required either to belong to the union or to pay the union a service fee equivalent to dues. (A. 126)

For a number of years the union has had in effect a rule which required union members to limit their reporting of production so that their earnings of incentive pay would not exceed certain specified ceilings. The ceilings. were the subject of collective bargaining between the company and the union from time to time. Although the company knew of the existence of the ceilings and attempted to have them raised or eliminated, the company did not recognize the ceilings as a limit on the amount which an employee could earn. The ceilings have never been incorporated in the collective bargaining contract as a term of employment. (A. 128) If an employee chose to ignore the ceilings and produce and report work in excess of the ceilings, the company paid the employee for his actual production without regard to the ceilings. (A. 127)

Local 283 of the respondent International Union, UAW-AFL-CIO.

²The practical effect of the ceiling rule was elaborated in the opinion of Board member Leedom:

[&]quot;The Employer has placed no limits on the employees' production or earnings and has vigorously opposed such a limitation, but without success. The Company is in a highly competitive market, and

The union enforced the ceiling rule by imposing fines on members. Ordinarily the fines were limited to one dollar for each violation. However, persistent violations subjected an employee to a charge of conduct unbecoming a union member with consequent exposure to fines up to \$100 for each offense. (A. 127) The petitioners here were charged with conduct unbecoming a union member for having violated the ceiling rule, and following union trials, fines ranging from \$50 to \$100 were imposed. The union has instituted civil actions in the Wisconsin courts for the collection of such fines, which actions are still pending. (A. 129)

The petitioners here filed charges with the National Labor Relations Board alleging that the union action in imposing and attempting to collect fines for violation of the ceiling rule restrained and coerced the petitioners in the exercise of their right under Section 7 of the National Labor Relations Act to refrain from concerted union activities. A complaint was issued by the General Counsel of the Board alleging that such action by the union constituted an unfair labor practice under Section 8(b) (1) (A) of the Act. The Board (with member Jenkins concurring and member Leedom dissenting) dismissed such complaint, finding that no unfair labor practices had been committed. (A. 137)

the increased costs resulting from the Union's production ceilings have caused a decline in its competitive position. The record shows that the Union's production ceilings have reduced and slowed down production, that an employee can reach the production ceiling in 5 hours, and that the employees have read books, played cards, and talked in the remaining time.

In spite of this, the employees produce more than the production ceilings allow. The excess is 'banked' for payment in the future when an employee is unable, for any reason, to produce the maximum allowable under the production ceilings." 145 NLRB 1097 at 1106 (A. 140)

Pursuant to Section 10(f) of the Act, the petitioners here petitioned the Seventh Circuit Court of Appeals for review of the decision and order of the Board. Consideration of the merits of the petition was delayed in the Court of Appeals pending the review by this Court of the right of the union to intervene as a party in the proceedings before the Court of Appeals. Thereafter proceedings were further deferred pending the consideration by this Court of related issues which were ultimately resolved in the case of National Labor Relations Board v. Allis-Chalmers Manufacturing Co., 388 U.S. 175. Following that decision the Court of Appeals renewed consideration of the petition for review in the present case and ultimately denied the petition by a divided court with senior judge Knoch dissenting. (A. 151)

The opinion of the Court of Appeals (A. 151) was issued March 5, 1968, together with an order calling for the subsequent entry of a decree (A. 162). In due-course a proposed decree was prepared by the General Counsel for the Board and forwarded to the Court and the parties April 3, 1968 (A. 163). The decree of the Court of Appeals was entered April 16, 1968 (A. 166, 167). The petition for certiorari was filed and docketed in this Court July 6, 1968 and the order allowing certiorari was filed October 14, 1968 (A. 169).

SUMMARY OF ARGUMENT

The decision below upholds the validity of a coercive union device for restricting the productive output of an individual employee. Although the individual is willing to work in accordance with his abilities and the employer has agreed to pay him for whatever work he produces, the

BHereinafter called the Allis-Chalmers case.

union fine effectively inhibits the employee from earning the money the employer is willing to pay.

It is an essential foundation of national labor policy that issues of wages, work loads and productive output should be resolved through the collective bargaining process. This concept is the bedrock of the Act. Yet through the device of coercive fines, the union here effectively bypasses the collective bargaining process and enforces a production and wage limitation which it was unable to obtain in negotiations with the employer.

It is unnecessary to indulge in a detailed examination of the workings of the union rule or the role of the company in its historical development. The essential fact remains, as conceded by the Respondents and found by the Board, that the union ceiling is not imposed by the collective bargaining agreement. An employee who chooses to disregard the union rule and to report all production for immediate payment, will be fully paid by the company despite the fact that such payment may exceed the union's ceilings. It is the union rule and the coercive enforcement thereof, not the company nor the collective bargaining agreement, which limit an employee in the amount he can earn from his work.

This basic fact is also the short answer to the philosophical objections of the union to incentive pay plans and potentially excessive work standards. Under the Act the union has been granted an extraordinary array of privileges to assist it in enforcing these objections. The union is privileged to bargain for the wages, hours and working conditions of the Petitioners, whether they like it or not, by virtue of the exclusive representation concept of §9 of the Act. The union is privileged to negotiate a straight hourly pay system, to negotiate work standards

and to negotiate upper limits on incentive pay; the Petitioners would be bound by any such agreement. Finally, the union is privileged to negotiate an agreement which requires every employee to pay dues to the union or an equivalent service fee.

But all this, says the union, is not enough coercive power. Instead of accomplishing its objectives through collective bargaining as the Act permits and encourages, the union by-passes the collective bargaining process and attempts through coercive fines to restrain its members from earning the wages which the company is obligated to pay under the collective bargaining agreement negotiated by the union itself. The privileges of coercion established by the Act do not extend so far.

Section 7 of the Act guarantees to each employee the right to refrain from any union concerted activity. The employees here were exercising their §7 rights when they refrained from the union production limitation and earned the wages provided under the applicable collective bargaining agreement. Printz Leather Co., Inc., 94 N.L.R.B. 1312.

Under §8(b) (1) (A) of the Act a union commits an unfair labor practice where it restrains and coerces an employee in the exercise of §7 rights. The union fines here constitute such a coercion within the meaning of §8(b) (1) (A). Nor are the fines exempt under the proviso to that section. The proviso relates only to union rules affecting the acquisition of union membership and the retention of union membership. The proviso does not extend to coercive union fines in derogation of §7 rights.

In two recent cases this court has considered the validity of union discipline under §8(b) (1) (A) of the Act. In both cases the decisions departed from the literal language of the statute because of special policy considerations. In N.L.R.B. v. Allis-Chalmers Manufacturing Co., 388 U.S. 175, the literal-language of §8(b) (1) (A) was held inapplicable to union fines imposed against employees who worked during a strike because of the special policy considerations favoring the full protection of the union strike power. In N.L.R.B. v. Industrial Union of Marine & Shipbuilding Workers, A.F.L.-C.I.O., 391 U.S. 418, a violation of §8(b) (1) (A) was found, despite the literal language of the proviso, where a union expelled a member for having filed charges with the Board, again because of a special policy consideration - here the need to preserve free access to the processes of the Board.

The special policy considerations involved in those cases are not present here. The policies involved here dictate that the statute should be applied in accordance with its terms.

The Court of Appeals considered that the Allis-Chalmers decision required a finding that the union fines here were not unfair labor practices. While the result in the Allis-Chalmers case may support such a view, the reasoning of the majority opinion in that case suggests the opposite conclusion. The essential reason for upholding the union fines there was that the fines in that case were found to be in aid of the proper collective bargaining function of the union which the Act seeks to foster and protect. Here, by contrast, the union fines bypass, weaken and diminish this collective bargaining function and thus offend, rather than promote, the policies which the Allis-Chalmers decision found controlling.

The Allis-Chalmers decision is distinguishable, from the present case in two important respects. Most important is the difference in union goals involved. The union goal in the Allis-Chalmers case, the maintenance of an effective economic strike, was a goal which commands the highest protection under the Act. By contrast, the union goal here, a production restriction commonly known as featherbedding, is not even a protected activity under the Act.

A second important point of distinction is the question of the alternatives available to the union. In the Allis-Chalmers case the union fines were the alternative to the violence which has commonly erupted in similar situations where a union and its members sought to prevent other employees from working during a strike. Here the situation is entirely different. The union can accomplish its purposes through the usual collective bargaining processes under the Act. The Act seeks to foster and encourage resolution of such questions through collective bargaining. The enforcement of the union production limitations through coercive union fines bypasses the normal collective bargaining process and thus is inimical to the policy of the Act.

The Allis-Chalmers decision was rendered by a sharply divided court. Its validity is doubtful. It can be justified, if at all, only by reference to the special policy considerations involved in the strike situation. There is no warrant for extending the Allis-Chalmers principle to cases where those policies are not involved.

The Allis-Chalmers principle could appropriately be extended to this case only by accepting the view that an employee who joins a union thereby waives his statutory protection against union coercion in the exercise of his §7

the Allis-Chalmers case, 388 U.S. 175, 197-198. And absent the special policy considerations involved in the Allis-Chalmers case, a union fine violates §8(b)(1)(A). Cf. dissenting opinion of Mr. Justice Black in the Allis-Chalmers case, 388 U.S. 175, 199-217.

The proviso to §8(b) (1) (A) disclaims any impairment of the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership. But the imposition and attempted enforcement of the fine here go well beyond any question of acquisition or retention of membership in the union. Rather than seeking to enforce the fine by expulsion from the organization, the union is attempting to collect the fine through court procedures. The Wisconsin courts have held that union fines may be collected in this manner. U.A.W. v. Woychik, 5 Wis. 2d, 528, 93 N.W. 2d 336. Moreover, they have held that these can be so collected regardless of any contrary state policy. Local 248, U.A.W.-A.F.L.-C.I.O., v. Natzke, 36 Wis. 2d 237, 153 N.W. 2d 602.

The Board itself has held that union fines constitute unfair labor practices under §8(b) (1) (A) where the fines are imposed upon an employee for seeking recourse to the processes of the Board. Local 138, International Union of Operating Engineers, 148 N.L.R.B. 679; Roberts v. N.L.R.B., 350 Fed. 2d; Wood, Wire & Metal Lathers' International Union, Local No. 238, 156 N.L.R.B. 997. Moreover, the Board has adhered to this view even since the Allis-Chalmers decision. American Bakery & Confectionery Workers Local Union 300, 167 N.L.R.B. No. 76; 66 L.R.R.M. 1107.

The violation is apparent upon the face of the statute. Since there are no special and overwhelming policy considerations of equal weight to those found controlling in the Allis-Chalmers decision, the union fines here are banned by the Act.

This Court has had two recent opportunities to consider the validity of union discipline under §8(b) (1) (A) of the Act. In the Allis-Chalmers decision it was determined that a fine imposed upon a member for having crossed a picket line and worked during a strike did not violate §8(b) (1) (A). Subsequently in N.L.R.B. v. Industrial Union of Marine & Shipbuilding Workers of America, A.F.L.-C.I.O., 391 U.S. 418, it was held that a union violated §8(b) (1) (A) by expelling a member from membership because the member, had filed charges with the Board in a prior matter without first exhausting his internal union remedies.

It is submitted that in both these decisions this Court relied upon special policy considerations as the basis for a departure from the literal application of the statute. In the Marine Workers case, expulsion from the union was found to violate §8(b)(1)(A) despite the fact that such an expulsion would appear to be immunized by the clear language of the proviso to that section. The special policy reason justifying this departure was the overriding need to assure free access to the remedial powers of the Board.

In the Allis-Chalmers case, on the other hand, a union fine imposed upon a member for working during a strike was held not to violate §8(b) (1) (A) despite the fact that such a fine is covered by the explicit language of the prohibition and is outside the scope of the proviso. In that case the special policy considerations which were deemed to require this departure from the literal statutory language were the fears of imposing any limitations upon the ultimate weapon which makes a union an effective collec-

tive bargaining agent — the power to maintain an effec-

Here we find no such overriding policy considerations. In this context the cross-currents of argument must be resolved in favor of the language of the statute itself. As was said in Local 1976, United Brotherhood of Carpenters & Joiners of America, A.F.L. v. N.L.R.B., 357 U.S. 93, 100:

"The problem raised by these cases affords a striking illustration of the importance of the truism that it is the business of Congress to declare policy and not this court's... Because of the infirmities of language and the limited scope of science in legislative drafting, inevitably there enters into the construction of statutes the play of judicial judgment within the limits of the relevant legislative materials. Most relevant, of course, is the very language in which Congress has expressed its policy and from which the court must extract the meaning most appropriate."

II. The Allis-Chalmers Decision Does Not Immunize the Union Fines-Here.

The majority opinion in Allis-Chalmers' emphasized the importance of maintaining the union strike power and expressed concern that by impairing the usefulness of labor's cherished strike weapon there would be a limitation upon the powers necessary to the discharge of the union statutory role as exclusive collective bargaining

There can be no question that this was the central rationale for the Allis-Chalmers decision. The decision was so described in the Marine Workers case, 391 U.S. 418, 423. As stated by Mr. Justice Black in his dissent in the Allis-Chalmers case, "The real reason for the court's decision is its policy judgment that unions, especially weak ones, need the power to impose fines on strikebreakers and to enforce those fines in court." 388 U.S. 175, 201.

agent. 388 U.S. 175, 181, 183. That same policy favoring collective bargaining requires a different result here. For union fines which are imposed for exceeding a union production limitation directly impair the collective bargaining process.

There are two critical distinctions between the present case and the Allis-Chalmers case. The first relates to the goal of the union disciplinary action. The second relates to the alternative methods available to the union to achieve its goal. As will be more fully developed below these distinctions lead inevitably to the conclusion that the union fines here violate the Act.

A. The Union Goal Here is Not Favored by the Law.

In the Allis-Chalmers case the goal of the union disciplinary activity was the preservation of an effective strike power. The right to strike is a privilege which is guaranteed the fullest protection under the Act. This right is at the very core of federal labor policy and is granted full and explicit protection under §13 of the Act:

"Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right."

How different is the goal of the union action here. As noted above, the ceilings reduce and slow down production, an employee can reach the production ceiling in five hours and the employees have read books, played cards and talked in the remaining time. (See Note 2, pp. 3-4, supra.)

Despite this limited effort the employees consistently earn very close to the ceiling rate, their average earned rate being approximately near the ceiling. (T. 250, A. 21; T. 369, 526) Moreover, when the ceilings are raised the employees very quickly are able to raise their production to the new rate. (T. 526) Nevertheless the ceilings permit good earnings which compare favorably with other wages in the area. (T. 249-250, A. 20-21). The union itself concedes that the original purpose of the ceiling was to "keep as many fellows working as we possibly could." (T. 553, A.45) The only reasonable conclusion from this evidence is that the ceilings constitute pure and simple featherbedding designed to provide work for more employees than the job requires.

While this type of practice may be a common historical union goal it has never been one favored by the law. Far from commanding the explicit protection granted to the strike power, such featherbedding practices lie on the border between unprotected concerted activities and outright illegality.

In the consideration of the Taft-Hartley bill, the form of the bill as it passed the House would have outlawed various defined featherbedding practices including an attempt to require an employer "to employ or agree to employ any person or persons in excess of the number of employees reasonably required by such employer to perform actual services." Leg. Hist. of the Labor Management Relations Act, 1947, Vol. I, 170. Although this provision of the House bill was not incorporated into the final legislation, the rejection was based upon practical difficulties of application rather than any dissent from the basic principle. As Senator Taft said:

"The Senate conferees, while not approving of feather-bedding practices, felt that it was imprac-

ticable to give to a board or a court the power to say that so many men are all right, and so many men are too many. ... We thought that probably we had better wait and see what happens, in any event, even though we are in favor of prohibiting all feather-bedding practices." Leg. Hist. of the Labor Management Relations Act, 1947, Vol. II, 1535.

Although the Taft-Hartley Act stopped short of branding union production limitations as illegal in themselves, neither are such activities protected by the Act. For example, in General Electric Co., 155 NLRB 208, the Board held that an employer did not commit an unfair labor practice when it discharged an employee for attempting to induce other employees to engage in a deliberate restriction of production under an incentive pay system. Such activity by the employee was found not to be protected under the Act.

Numerous other cases have established that the Act does not protect a variety of union techniques for slowing down or interfering with production. Representative decisions are Automobile Workers, Local 232 v. WERB, 336 U.S. 245; NLRB v. Montgomery Ward & Co., 157 F. 2d 486; Elk Lumber Co., 91 NLRB 333; Celotex Corp., 146 NLRB 48; Raleigh Water Heater Manufacturing Co., 136 NLRB 76. Moreover, the Board has specifically recognized that an employee has the protected right under the Act to refrain from such union production restrictions. Printz Leather Con pany, Inc., 94 NLRB 1312.

Further evidence of the legislative disapproval of featherbedding practices is found in the Lea Act, 47 U.S.C. 506, 60 Stat. 90. The Lea Act broadly prohibits featherbedding practices in the broadcasting field. These provisions were upheld against attacks as to their constitutionality in U.S. v. Petrillo, 332 U.S. 1.

The sharp distinction between the union goals involved in the Allis-Chalmers case and the goals involved here is highlighted in the article by Professor Summers, Legal Limitations on Union Discipline, 64 Harv. L. Rev. 1049, one of the principal authorities relied upon by Mr. Justice Brennan in his Allis-Chalmers opinion. That article reviews the existing precedents with regard to various reasons for union discipline and points out that while discipline for strike-breaking is universally recognized, discipline relating to production restrictions has not been enforced by the courts. See 64 Harv. L. Rev. 1049, 1065. An observation of great force here can be found in the case of Dragwa v. Federal Labor Union No. 23070, 41 Atl. 2d 32, 34:

"... if a voluntary trade organization should ordain that a member who in the pursuit of his occupation exceeds the average level of industry and production of his fellow workers, shall be expelled for conduct unbecoming a member, I would experience no hesitancy in invalidating such a regulation as positively repugnant and inimical to our traditional public policy. The freedom of an individual to excel in any field of lawful activity is one of our national ideals and a substantial right which the individual may not himself barter away."

In the Allis-Chalmers case this Court permitted a union fine which it deemed to be in furtherance of the proper role of the union as a collective bargaining agent and the exercise of the traditional union strike power. The principle of that case must not be extended to permit fines in furtherance of other union goals which do not further the purposes of the Act, and in fact do not even command the protection of the Act.

B. The Union Fines Here Are Inimical to the Collective Bargaining Process.

In the context of the Allis-Chalmers case, the union had no practical legal alternative for the attainment of its goal. The union sought to prevent employees from working during a strike. All too often in the past, violence has erupted as striking unions attempted to achieve such an objective.

By contrast here, the union has available a perfectly lawful and effective alternative. If it wishes to impose production limitations, earnings ceilings, or any similar term or condition of employment, it can and must achieve this purpose through the usual collective bargaining process.

One of the fundamental purposes of the Act is to encourage the use of collective bargaining to resolve such questions. By intead unilaterally attempting to regulate such a subject by fines upon its members, the union weakens and destroys the institution of collective bargaining which is the heart of the Act.

Section 1 of the Act states this policy in unmistakable terms:

"It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining. . . ."

Petitioners do not mean to suggest that a union has any right to prevent employees from working during a strike. The Act has been uniformly interpreted to the contrary. But assuming from experience that a union will nevertheless attempt to obtain this objective, even by violence where necessary, the fines as found in the Allis-Chalmers case appear to be a more acceptable alternative.

Here the union has been unsuccessful in attempting to obtain its goals through the usual and proper collective bargaining processes. It nevertheless seeks to gain the same objective by imposing coercive fines upon its members. If such a power is sustained, the policy of the Act to encourage collective bargaining will be thwarted. The union will have no need or incentive to negotiate in good faith with an employer, Rather, through coercive union fines, it will impose its own conditions of employment whether or not they are accepted by the employer in collective bargaining.

The union claims that it is pursuing a legitimate objective which has been a union goal for many years. The union points to its long standing opposition to any form of incentive pay plan. Such claims are beside the point.

Act requires that this objective be attained through collective bargaining. A recent case which exhaustively reviewed this fundamental principle was Associated Home Builders of the Greater East Bay v. N.L.R.B., 352 Fed. 2d 745, remanding to the Board for further consideration the question of the legality of a union fine imposed to enforce a production limitation adopted by the union without first bargaining with the employer. Coercion against employees to restrict incentive pay violates the Act. N.L.R.B. v. Brotherhood of Painters, 242 Fed. 2d 477, holding that a union violated §8(b) (1) (A) by causing the discharge of an employee for having refused to abide by union policies prohibiting incentive pay.

⁷Even granting this history, the legitimacy of the union objective is doubtful where the effect of the union action is to promote extreme featherbedding practices such as are disclosed by the record here.

The union here has negotiated a contract which calls for eight hours work in a day and imposes no limit upon the amount that an incentive worker may earn. The petitioners here sought to abide by that contract, to work the regular work day and not artificially curtail production, and to earn the wages permitted by the contract. The union seeks to prevent them from doing so by imposing coercive fines. Unlike the fines in the Allis-Chalmers case, which were found to be in futherance of the exercise of the collective bargaining function of the union, the fines here bypass the collective bargaining process and weaken it. As such they cannot be tolerated under the Act.

III. The Principle of the Allis-Chalmers Decision Should Not be Extended.

As pointed out in the very forceful dissent of Mr. Justice Black in the Allis-Chalmers case, the decision there was contrary to the express language of the Act, its legislative history and its policies. The validity of the decision is doubtful. If it is to be sustained at all, it must be limited to its particular facts and not further extended.

The fundamental error of the Allis-Chalmers decision is its reliance upon the unsupported opinion of a text-writer that the power to fine employees who work during a strike is essential to the effective discharge of the union collective bargaining function. Quite obviously, Congress did not agree with this conclusion. If Congress believed that every employee should be required to honor any strike that was approved by majority vote, Congress could have so provided. But, of course, the Act provides precisely to the contrary and instead protects the individual choice of each employee to decide free from coercion whether to engage in or refrain from a strike or other concerted activity.

The fundamental concern of Congress as, reflected in \$7 of the Act was to protect the individual from coercion by either his employer or his labor organization. Extensive legislative hearings had conclusively demonstrated the need for such protection. The uncoerced right of the individual to engage in or refrain from concerted activities is the ultimate check and balance which restrains arbitrary action by an employer, by a labor organization or by a majority of employees in derogation of the rights of the minority. This is precisely the check and balance which Congress sought to achieve in the Taft-Hartley Act.

The majority opinion in the Allis-Chalmers case builds upon the assumption that unions need the power to fine their members in order to achieve their proper objectives under the law. Such an assumed need simply cannot be documented by the history of labor relations in this country. Unions have grown and flourished, have commanded the uncoerced allegiance of their members and have discharged their collective bargaining functions with great vigor, all without the need for imposing court collectible fines upon their members. Prior to the Allis-Chalmers decision there does not appear to be a single reported court case where a union had been upheld in the collection of a fine of the type involved there.

The majority opinion in the Allis-Chalmers case seems preoccupied with the alleged needs of "weak" unions. However, it offers no explanation as to why a "weak" union should be entitled to any support from this Court. The Act would not support such a view. A "weak" union is weak for the simple reason that it is unable to win the allegiance of the employees. Under the Act it is the employees, not the union whose wishes are paramount. The union can become and remain a collective bargaining agent under the Act only through the free choice of the employees. The Act specifically forbids a union from attempting to increase its strength through coercion of the employees whom the union is supposed to serve.

It would seem appropriate for this court to reexamine the assumptions underlying the majority opinion in the Allis-Chalmers case and explicitly overrule that decision. But even if the Allis-Chalmers principle is accepted as applied to the special problem faced by unions when members work during a strike, there is clearly no warrant for extending that principle to the present situation. Here there can be no claim that the union needs the fine power to achieve its goals, since the goals are ones that can and must be achieved through the give and take of the collective bargaining process.

The only theory which would justify the extension of the Allis-Chalmers principle to this case would be a theory that an employee who voluntarily joins a labor organization waives the protection of the Act and submits himself to any and all discipline which a union may choose to impose. Such a theory cannot be sustained.

Since the case of Radio Officers v. Labor Board, 347 U.S. 17, it has been established that the protection of the Act extends not only to the choice of joining or not joining a union, but also permits employees to be "good, bad or indifferent members". 347 U.S. at 40. The legislative history reviewed in the dissenting opinion of Mr. Justice Black in the Allis-Chalmers case confirms the express intention of the sponsors of §8(b)(1)(A) to protect union members against coercion by their leadership. 388 U.S. 175, 209-210. Any such waiver theory would obviously be inconsistent with the decisions of the Board and this Court holding that union fines or expulsion imposed upon a member for exercising rights under §7 constitute a violation of §8(b)(1)(A) of the Act.

See N.L.R.B. v. Marine Workers, 391 U.S. 418 and other decisions reviewed at p. 12, supra. An employee who joins a labor organization does not waive his statutory rights. A union, in its member-

In any event, it is clear that membership is not truly voluntary here. Under the prevailing collective bargaining agreement the employee must either join the union or pay a service fee to the union equal to dues. As pointed out in the dissenting opinion of Board member Leedom, an employee is faced with the practical problem that he must join the union in order to have any voice in the services for which he must pay. (A. 140, n. 19)

Where a union security agreement is in effect which requires payment of dues or dues equivalent, membership may never be said to be truly voluntary. 115 Pa. L. Rev. 47, 62-63; 80 Harv. L. Rev. 683, 685-687; 76 Yale L. J. 563, 565-567. Even where there is no union security agreement, the fact that a union may become the bargaining representative for an employee against his wishes puts a great practical pressure upon the employee to join the union in order to have a voice in his own terms and conditions of employment. See Cox, Union Democracy, 72 Harv. L. Rev. 609, 612.

The fact that the Petitioners were members of the union in no way diminishes their statutory rights. The fact of membership does not of itself justify applying the Allis-Chalmers doctrine here.

Unlike the Allis-Chalmers case, we are not here concerned with a traditional and central union activity, such as the strike, which was given firm and explicit protection under the Act. Rather we here see a union activity which has never found favor with the Board or the courts and

ship agreement may not require the waiver of statutory rights any more than an employer could do so in an employment agreement. The membership relationship is subordinate to the statutory right of the employee to refrain from "any" concerted activity. See criticism of the waiver theory in 115 Pa. L. Rev. 47, 62-63, 66; 80 Harv. L. Rev. 683, 685-687.

which is not even protected by the Act. The policies underlying the Allis-Chalmers decision are not present here and the principle of that case, if it is sustained at all, should be limited to the particular facts of the strike situation.

IV. The Petition for Writ of Certiorari Was Timely.

The applicable statute provides as follows:

"Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days."

28 U.S.C. 2101(c)

Under the statute the ninety-day period for applying for the writ of certiorari commences "after the entry of such judgment or decree". The decree of the Court of Appeals was entered April 16, 1968. (A. 167) The petition herein was filed within ninety days thereafter. The petition was timely.

Respondents' briefs in opposition argued that an order of the Circuit Court dated March 5, 1968 (A. 162) should be regarded as commencing the ninety day period under the statute. Such order was neither a judgment non a decree but rather an order that a decree be entered at a subsequent time. The order was clearly intended to be tentative for it states:

"... upon presentation, an appropriate decree will be entered." (Emphasis supplied)

The order of March 5 is most nearly akin to an order directing judgment. Such an order is neither a judgment

nor a decree. As a general rule such an order does not even provide a basis for an appeal. The order of March 5 did not constitute the entry of a judgment or decree within the meaning of the statute.

Rule 14(1) of the Court of Appeals established a procedure for the entry of a decree enforcing the order of an administrative agency. That rule was applicable here. It is not relevant that the proceeding in the Court of Appeals was a petition for review rather than an enforcement proceeding as such. The effect of the action of the court was to enforce the order of the agency. 12

It is clear that both the court and the parties were proceeding under the foregoing rule in preparing and entering the decree in this case. The order of March 5,

See full text of the relevant statutes in the Appendix hereto.

^{10 &}quot;In the absence of specific statutory authority, it has generally been held that an order for judgment, that is, an order directing the entry of a formal judgment, does not support an appeal." 73 ALR 2d 250, 296-297.

¹¹ The rule provides: "Preparation of Decrees Enforcing Orders; Settlement; Entry. When an opinion of this court is filed directing the entry of a decree enforcing in whole or in part the order of an administrative agency, board, commission, or officer and the court has not entered the decree, the agency, board, commission, or officer concerned shall within 10 days serve upon the opposing party and file with the clerk a proposed decree in conformity with the opinion. If the opposing party objects to the proposed decree as not in conformity with the opinion he shall within 5 days thereafter serve upon the agency, board, commission, or officer concerned and file with the clerk a proposed decree which he deems to be in conformity with the opinion. The court will thereupon settle and enter the decree without further hearing or argument."

¹² Section 10(f) of the National Labor Relations Act dealing with review proceedings authorizes the Court of Appeals "to make and enter a decree enforcing, modifying) and enforcing as so modified, or setting aside in whole or in part the order of the Board" the same as in the case of an application by the Board for enforcement of its order under Section 10(e).

1968 expressly directed the subsequent entry of a decree. It did not itself use the language appropriate to a judgment or decree. The existence of the order was not even communicated to the parties by the court or the clerk.

Subsequently counsel for the Board forwarded to the court a proposed decree. The covering letter on its face concedes that no decree had yet been entered. (A. 163) The clerk then transmitted the draft decree to counsel for the petitioners as contemplated by Rule 14(1). (A. 165) Thereafter under date of April 16 the clerk notified the parties that the final decree was "entered" by the court on April 16, 1968. (A. 167) The final decree of April 16 used language appropriate to a judgment and was formally signed by the three judge panel of the court. (A. 169)

Significantly, while it refers to the prior opinion of March 5, the decree does not even mention the prior order. Obviously the order of March 5 was neither a judgment nor a decree.

The statutory period runs from the date of "entry of such judgment or decree". The foregoing sequence of events can leave no doubts that that date was April 16, 1968.

A directly comparable authority is Rubber Company v. Goodyear, 73 U.S. (6 Wall.) 153. In that case the lower court had entered an order resolving the issues. A week later a final decree was filed and entered virtually duplicating the previous order. This Court held that the formal decree rather than the prior order governed the time for appeal.

The Court said:

"Upon these facts we cannot doubt that the entry of the 28th of November was intended as an order settling the terms of the decree to be entered thereafter; and that the entry made on the 5th of December was regarded both by the court and the counsel as the final decree in the cause.

"We do not question that the first entry had all the essential elements of a final decree, and if it had been followed by no other action of the court, might very properly have been treated as such. But we must be governed by the obvious intent of the Circuit Court, apparent on the face of the proceedings. We must hold, therefore, the decree of the 5th of December to be the final decree." 73 U.S. (6 Wall.) at 155-156.13

The cases relied upon by the respondents are readily distinguishable. In both FTC v. Golgate-Palmolive Co., 380 U.S. 374 and U.S. v. Adams, 383 U.S. 39 the petitions were found to be timely. Both cases involved a situation where the lower court had admittedly entered a judgment and the sole question presented was whether the failure to petition after such judgment precluded a petition subsequent to a revised judgment. Neither case involved the issue presented here; i.e., the determination of the date of entry of the original judgment or decree of the court.

In Federal Trade Commission v. Minneapolis-Honey-well Co., 344 U.S. 206 (1952), a case also cited by respondents, the court of appeals entered a judgment reversing part III of three parts of a cease and desist order issued by the commission against Honeywell. After expiration of the period allowed for a petition for rehearing, the commission filed a memorandum calling attention

¹⁸ See also Puget Sound Power & Light Co. v. County of King, 264 U.S. 22; U.S. v. Gomez, 68 U.S. (1 Wall.) 690; Commissioner v. Estate of Bedford, 325 U.S. 283; U.S. v. Hark, 320 U.S. 531; and Wheeler v. Harris, 80 U.S. (13 Wall.) 51.

II, for which the commission had cross-petitioned. The memorandum requested no alteration of the judgment relating to part III. Consequently, the court of appeals issued a decree enforcing parts I and II and reiterating the reversal of part III. More than 90 days after entry of the first judgment, the commission petitioned for certiorari to review the judgment reversing part III of its order. This Court held, with Mr. Justice Black and Mr. Justice Douglas dissenting, that the 90 day period allowed by 28 U.S.C. 2101 (c) began to run on the date of the first judgment.

That case has no relevance here. Unlike the present case, the judgment entered there was clearly intended to be a final judgment and it in fact used the word "adjudged." This judgment would have been the final action by the court but for the inadvertent failure to dispose of other uncontested portions of the case.

Here there was no such prior judgment. The March 5 order by its terms was tentative. It required presentation of a decree for entry, And only on April 16 was a judgment or decree first entered.

Department of Banking of Nebraska v. Pink, 317 U.S. 264, cited by respondents, is a case in which a state appellate court had taken final action and the sole issue was whether a slight subsequent modification which did not change the substance of the prior action would extend the applicable time limits.¹⁴ By contrast here, the decree of

That case also involved the issue of whether the time for seeking review in this Court should be measured from the final action of the state appellate court or whether the measuring date was the subsequent entry of judgment in the lower state court. The action by the appellate court was deemed controlling. Cole v. Viollette, 319 U.S. 581, is a similar case.

the Circuit Court was first entered within the meaning of the statute on April 16, 1968. No question of a subsequent modification is involved.

The new Federal Rules of Appellate Procedure which were effective July 1, 1968 substantially clarify and formalize the procedures in question here. Particularly pertinent will be Rule 36 which specifically defines the concept of entry of judgment. Most important, both Rules 36 and 45 (c) require the clerk to notify each of the parties of the entry of a judgment thus eliminating the likelihood of ambiguity or unfairness in measuring time limits. Here the order of March 5 was not even communicated to the parties.

The issue of timeliness presented by the present petition is not likely to arise under the new rules. Thus there is no continuing policy to be served by questioning the procedures followed here. The obvious intention of the court below, confirmed by the actions of the clerk and the parties, to frame a decree for formal "entry" subsequent to the opinion date should be given controlling effect. It would be a manifest injustice to these petitioners if the timeliness of the present petition were to be denied upon the technical grounds advanced by the re-

Rule 36.

ENTRY OF JUDGMENT

The notation of a judgment in the docket constitutes entry of the judgment. The clerk shall prepare, sign and enter the judgment following receipt of the opinion of the court unless the opinion directs settlement of the form of the judgment, in which event the clerk shall prepare, sign and enter the judgment following final settlement by the court. If a judgment is rendered without an opinion, the clerk shall prepare, sign and enter the judgment following instruction from the court. The clerk shall, on the date judgment is entered, mail to all parties a copy of the opinion, if any, or of the judgment if no opinion was written, and notice of the date of entry of the judgment.

¹⁵ The rule provides:

spondents.¹⁶ The petition herein was timely and should be considered on its merits.

V. Conclusion

The decree of the Court of Appeals denying the petition for review of the order of the Board dismissing the complaint against the union should be reversed with directions requiring the Board to enter an appropriate remedial order finding that the union has committed unfair labor practices under the Act.

Respectfully submitted,

JAMES URDAN,

Attorney for Petitioners

¹⁶ On May 22, 1968, within ninety days of March 5, 1968, the date claimed by the respondents to be the measuring date, petitioners filed with this Court an application for an extension of time within which to file a petition for a writ of certiorari. Such application clearly disclosed that the petitioners considered July 15, 1968 to be the then time limit and the application sought an extension to September 1, 1968. At that time neither respondent raised an issue as to the time limit. The application for extension of time was denied. Petitioners submit that if the issue had been raised at that time different considerations would have governed the decision of the Court with respect to the application for extension of time. Moreover the timing of the filing of the petition here caused no delay in fact since in either case the petition would have been considered and acted upon during the recess of the Court, with decision possible no earlier than the actual decision date here, October 14. To suggest that this totally immaterial delay should defeat the petition seems ludicrous in the light of the extraordinary delays at prior stages of the proceedings. The relevant docket entries disclose that the Board proceedings required three years to the day and the case was pending in the Court of Appeals for the extraordinary period of nearly four years. (A. 1)

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. §151, et seq.) in addition to those set forth supra, p. 2, are as follows:

"FINDINGS AND POLICIES

"SECTION 1. The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

"The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

"Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest,

by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

"Experience has further demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.

"It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

"REPRESENTATIVES AND ELECTIONS:

"SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment:

"SEC. 10. (e) The Board shall have power to petition any court of appeals of the United States, or if all the

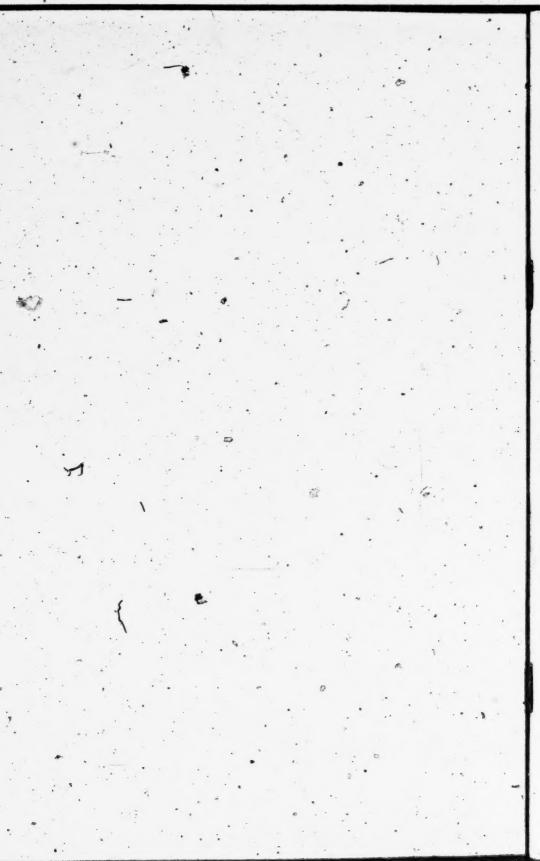
courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings. which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its

judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

"(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

"LIMITATIONS

"SEC. 13. Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right."



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In the

Supreme Court of the United States

Остовев Тевм, 1968

RUSSELL SCOFIELD, LAWRENCE HANSEN, EMIL STEFANEC, and GEORGE KOZBIEL

Petitioners.

VS.

NATIONAL LABOR RELATIONS BOARD and INTERNATIONAL UNION, UAW-AFL-CIO,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF AMICI CURIAE OF WISCONSIN MANU-FACTURERS ASSOCIATION, EMPLOYERS ASSO-CIATION AND CERTAIN MEMBERS OF CONFER-ENCE OF STATE MANUFACTURERS ASSOCIA-TIONS, INC., IN SUPPORT OF PETITIONERS

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With consent of the parties, the Wisconsin Manufacturers Association, the Employers Association, and Certain Members of Conference of State Manufacturers Associations, Inc. respectfully submit this brief as amici curiae in support of the Petitioners' position in this case.

Interest of the Amici Curiae

The Wisconsin Manufacturers Association (WMA) is a voluntary association of manufacturing enterprises with operations in Wisconsin. It was founded in 1911 and is now constituted of over 1300 member-enterprises employing over 450,000 people. This constitutes approximately

Arizona Association of Manufacturers Georgia Business & Industry Association Illinois Manufacturers' Association . Indiana Manufacturers' Association Iowa Manufacturers' Association Executive Committee Associated Industries of Kansas Associated Industries of Kentucky Associated Industries of Maine Michigan Manufacturers' Association Mississippi Manufacturers' Association New Hampshire Manufacturers' Association New Jersey Manufacturers' Association Associated Industries of New York State, Inc. Ohio Manufacturers' Association Associated Industries of Oklahoma Pennsylvania Manufacturers' Association Tennessee 'Manufacturers' Association Texas Manufacturers' Association Utah Manufacturers' Association Virginia Manufacturers' Association Association of Washington Industries West Virginia Manufacturers' Association

¹ Because of time limits and the inability to hold a special meeting of the association, the following members of the Conference of State Manufacturers Associations, Inc. only were able to reply to a poll indicating their affirmative desire to participate herein as amici curiae:

85% of all those employed in manufacturing in Wisconsin. The average number of employees per member of the association is under 100.

Since its founding, WMA has represented Wisconsin industries in obtaining equitable rail, air, mail and shipping rates, fair consideration on unemployment and workmen's compensation, taxes, wages and hours and labor-management legislation.

The Employers Association is a voluntary association of Wisconsin business firms operating in eight (8) south-eastern Wisconsin counties. It includes companies engaged in manufacturing, processing, distribution, banking, insurance, and graphic arts, as well as service organizations and institutions such as hospitals and nursing homes. It was organized in 1935, and stems from an earlier group founded in 1901. About 480 businesses comprise its present membership.

The Employers Association is a working business organization staffed to provide services to members in the broad field of employee relations. It originates, or secures data, and offers counseling and training for self-improvement in management skills. Though not directly affiliated with other organizations, the Employers Association works closely with various national, state and local employment groups.

The Conference of State Manufacturers Associations, Inc. (COSMA), is a voluntary association of the primary associations for the manufacturers of each state where one exists. Present membership includes thirty-nine such member-organizations. The WMA is one such member.

COSMA was organized to improve and advance American industry through close cooperation and mutual assist-

ance between state manufacturers' associations, including the exchange of technical and general information on problems of primary importance to state groups.

To further these goals, COSMA performs a number of functions. Among these are the following: serving as a forum for the discussions of important problems of primary concern to state manufacturers' groups, including Federal and state programs and regulations affecting industry, and serving as a clearing house for information, technical assistance, and action on matters requiring special attention by state manufacturers' associations.

The interest of the WMA, the Employers Association, and those members of COSMA joining this brief stems not only from the natural interest provoked by reason of a question concerning the interpretation of a collective bargaining agreement, but from their long time interest in labor-management affairs, and especially in the protection of the rights of individual employees under Section VII of the National Labor Relations Act, as amended (49 Stat. 449, 61 Stat. 136, 29 USC, §151, et seq.; hereafter "Act"), and the preservation of the principle of collective bargaining. The fines involved here have been the subject of many discussions, quite often with the mention of Wisconsin industry, and always with the mention of American industry. The interest of amici here is to assist in righting an error in the administration of the Act which has become manifest in these long proceedings. The effect of such error, if allowed to stand, would be so far-reaching that the attendant evil will undoubtedly cause a regression in the effectiveness of the collective bargaining process and the creation of a series of acrimonious labor-management disputes for years to come.

After an extended hearing and review, the National Labor Relations Board held, member Leedom dissenting, that the fines here imposed by the Union on employees who had violated the Union's production ceiling were not violative of §8(b)(1)(A) of the Act. That decision is reported at 145 NLRB 1097.

Upon a petition for review, the United States Court of Appeals for the Seventh Circuit, Judge Knoch dissenting, denied review of the Board's findings, thereby leaving the Board's decision of dismissal standing. That decision is reported at 393 F. (2d) 49.

On October 14, 1968, this Court granted a Writ of Certiorari in this matter. U.S., 89 S.Ct. 120.

The two issues in this matter are:

- 1. "Whether a Union restrains or coerces an employee in the exercise of a right guaranteed by Section 7 of the National Labor Relations Act, in violation of \$8(b)(1)(A), when the Union fines the employee and attempts to collect such fine by Court action, because the employee performed work and earned wages in excess of certain production quotas established and enforced by the Union."
- 2. "Whether the Petition for a Writ of Certiorari was timely filed."

This brief amici curiae is addressed only to the first question presented and emphasizes from the objective views of industry in general, rather than the partisan views of the parties litigant, what are considered the errors in the decision below.

ARGUMENT

1. The Act Elevates Collective Bargaining and Agreements Reached Thereby to a Unique and Favored Status.

In the case at bar, the simplest facts are that an employee has performed his work consistent with the collective bargaining agreement negotiated between the management and the union pursuant to the Act. This work performance, however, has violated a by-law rule of the union imposed upon its members and accordingly a fine and discipline are being initiated. Under the terms of the union rule, a fine could be imposed for daily violation and thereby, if enforced, economically cost the employee more to work than to remain idle. It is asserted that under these circumstances the union is violating §8(b)(1)(A).

From its inception it has been recognized that Congress has created a unique and favored institution in collective bargaining. It is the institution Congress selected to protect the rights of individual employees and enhance the prespects of industrial peace. NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1. Through this process labor and management were given the vehicle to establish "their own charter for the ordering of industrial relations." Compulsion by government was limited to the forcing and protection of the institution of collective bargaining, for agreement or concession is not required. NLRB v. American Nat. Ins. Co., 343 U.S. 395, 402 (1952).

- So favored is the institution of collective bargaining that unilateral action by one of the parties while the duty to bargain exists is unlawful. *NLRB* v. *Katz*, 369 U.S. 736 (1962); *Fibreboard* v. *NLRB*, 397 U.S. 203 (1964); no

private agreement touching on the subject of wages, hours and working conditions between employer and employee obviates, negates or waives the duty to bargain, J. I. Case Co. v. NLRB, 321 U.S. 332 (1944); nor can the enforcement of state law proscribe in any manner the rights and obligations of the parties. Local 24, Teamsters v. Oliver, 358 U.S. 283 (1959).

Once the collective bargaining agreement has been reached, various consequences stem therefrom. It has been said that the agreement "trades out the terms of employment" and that the employee by virtue of the Act becomes "somewhat as a third party beneficiary to all the benefits" of it. J. I. Case Co., supra, pp. 335-336. Accordingly, an employee-beneficiary can bring suit for a claimed breach of the collective bargaining agreement in either federal or state court. See, Smith v. Evening News Ass'n., 371 U.S. 195, 199-200 (1962).

Here, petitioners have performed work and have received benefits in accordance with the terms of the collective bargaining agreement. They do not seek to enforce the labor agreement, but the claim is made that by asserting their rights as negotiated for their benefit by the union, they have violated a union-imposed production ceiling and are therefore subject to fine and discipline. Is this by-law restriction to be given a wider exemption from negation than unilateral action, private agreements or impinging state laws? It is submitted that it should not.

2. Union Discipline in Contravention of Rights Negotiated in a Collective Bargaining Agreement Should Not be Condoned.

The efficacy of union discipline vis-a-vis a collective bargaining agreement was before this Court in an analogous situation earlier. In NLRB v. Teamsters, 347 U.S.

17 (1954), an employee was five days late in paying his union dues and the union, which it had a right under the literal terms of the collective bargaining agreement, dropped the employee from 18th on the seniority list to 54th. The employee filed a charge under the Act claiming the union had violated \$8(b)(1)(A). In affirming the Board's position that the Act had been violated, this Court observed that with respect to union membership the Act attempted to insulate an employee's job rights from his organizational rights and that the Act guaranteed employees the right to "be good, bad or indifferent members (of unions) or abstain from joining any union without imperiling their livelihood except as restricted by a legal union security agreement." Page 40.

Here, petitioners are being coerced in the same manner as the employee who fails to pay his dues—i.e., the collective bargaining agreement does not provide for such discipline; his indifference or bad membership in the union is being advanced as the reason to imperil his livelihood; and he is being deprived of his right to abstain from union activity without affecting his job status.

Viewed from another perspective, the union's enforcement of its production ceiling by-law is nothing more than a unilateral attempt to regulate wages in contravention of its mandatory duty to bargain them. Katz, supra, clearly reestablishes the long standing and broad rule prohibiting such action. Here, benefits have been negotiated between the parties and incorporated into an agreement. The employees seek to obtain the benefits. The union effectively places a substantial and meaningful deterrent to obtaining them by way of fine. Had the employer sought to impose production ceilings after negotiating the contract without them, he would have clearly violated the Act by

his unilateral action even though it could be asserted he had acted in his own legitimate self-interest to keep his payrolls within limits instead of cutting back hours or laying off. What the union does not do is allow this genuinely economic question to be raised and resolved by collective bargaining. It does not impose its production ceiling requirement upon the employer by insisting that it be placed in the bargained agreement.

That some segments of the union movement have held a traditional position in opposition to incentive pay programs cannot be denied. That this position may be said . to be consistent with "legitimate, union objectives" also may be admitted. But, it is submitted, the Board and the lower court have both missed the precise point on this argument. If it is said that regulation of production is a legitimate aim of the union in that it protects jobs for more members, then it is identical in quality with the other legitimate aims of unions such as recognition, union security, seniority, grievance procedures, etc. Consequently, the issue is not whether the aim is legitimate, but whether, assuming its legitimacy, the union can handle it unilaterally -outside the collective bargaining agreement. We submit that it cannot. The effective regulation of production and , thereby wages to be received is a matter upon which there must be bargaining, and cannot be dealt with unilaterally. Being so closely and intimately integrated with the wage structure, the question as to whether production ceilings shall be part of the "trade agreement" is clearly a mandatory subject of bargaining and it is doubtful whether either party can claim that the other has waived bargaining on the subject in the absence of a "clear and unmistakable" showing of the waiver. See, NLRB v. C & C Plywood Corp., 385 U.S. 421 (1967).

3. Internal Affairs of Union Doctrine Not Applicable.

In NLRB v. Industrial Union, 391 U.S. 498 (1968), this Court observed that the proviso to \$8(b)(1)(A) of the Act assured "a union freedom of self-regulation where its legitimate internal affairs are concerned." NLRB v. Wooster Division of Borg Warner Corp., 356 U.S. 342 (1958), teaches that a bargaining proposal by an employer which "deals only with relations between the employees and their unions" is only permissably bargainable—i.e., cannot be insisted upon to the point of impasse.

In the case at bar, the lower court held that the employer here could go to impasse on whether the union could maintain its production quota rules, but at the same time held no violation of $\S 8(b)(1)(A)$ had been made out because that section did not "encompass internal affairs of the unions." 393 F.(2d) at pp. 52 and 54.

It is submitted that for the reasons hereinabove set forth, the promulgation of production ceilings by one of the parties unilaterally and outside of the collective bargaining agreement is not a matter unrelated to wages, hours and conditions of employment. On the contrary, in essence being an integral factor in the subjects of mandatory bargaining, production ceilings cannot be equated to the "internal affairs" of a union. A production ceiling rule determines perforce hours worked, wages paid, and may involve the very essence of security the job. This is an historical position of some labor unions. Accordingly, the proviso to §8(b)(1)(A) of the Act must be read realistically. When Congress said that a labor organization could prescribe its own rules with respect to the acquisition or retention of membership, these words have to imply the additional proviso: so long as "no other considerations of public policy come into play." NLRB v. Industrial

Union, supra, at U.S., 88 S.Ct. 1717, 1721. Stated otherwise, a union can manage its own internal affairs relating to membership so long as it is not, under the guise of doing so, in fact avoiding its obligation to bargain; in fact, regulating wages, hours and conditions of employment in contravention of its collective bargaining agreement; in fact, tearing asunder the insulation between an employee's job rights and his organizational rights.

NLRB v. Allis-Chalmers Mfg. Co., 338 U.S. 175 (1967). held that union solidarity during a strike was a legitimate concern involving internal affairs. It was there said that the legislative history of the Act did not refer to "traditional internal discipline in general." But where Congress has protected the right to strike explicitly and guaranteed employees against discrimination for engaging in such concerted activity, it can hardly be said that other considerations of public policy are involved. Here, on the other hand, there are other considerations of public policy. Employees will, if the decision of the lower court stands, be denied the benefits they are entitled to under the negotiated agreement. Unions will be given carte. blanche to regulate wages, hours and conditions of employment outside of their negotiated agreements. Employers will be required to investigate the organic documents of the union in order to determine what disciplines on members must be negotiated to the employers' satisfaction, apparently, to the point of impasse until the offending by-law is amended or revoked. In time, what was referred to as an internal affair of the union will become an employer affair. Categorization of the facts herein as an internal affair of the union may be convenient for rationalization, but it does not accurately portray their true significance.

CONCLUSION

Congress, the Board and the courts have promoted and protected collective bargaining as the one best method for promoting industrial peace short of total governmental compulsion. This method does not require agreement, but it does require good faith bargaining and a signed agreement if resolution of issues is reached.

Negotiated agreements are enforceable by the beneficiaries of those agreements, including the employees covered thereby.

Where an employee seeks what he has earned under an agreement but is denied it effectively by unilateral action by one of the parties, a serious encroachment has been made in the institution of collective bargaining. When the denial springs from the union on the ground that it is merely regulating its internal affairs, it should not be countenanced. Such regulation is not purely an internal affair, but, on the contrary, is directly related to the mandatory subjects of collective bargaining.

Other considerations of public policy are involved hereviz., the sanctity of bargaining and the effectiveness of
contracts resulting therefrom. Industry has and will continue to fulfill its responssibilities to bargain and reach
agreements on the subjects of wages, hours and working
conditions. Having done so, however, it should not then
be required to bargain out a union's by-laws so that it
may be sure that its employees will not all be removed
from the economic arena by fines if they seek to gather
to themselves what their union and their employer have
negotiated for them.

For the foregoing reasons it is respectfully submitted that the decision below should be reversed with appropriate instructions.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 273

RUSSELL SCOFIELD, ET AL., PETITIONERS

NATIONAL LABOR RELATIONS BOARD AND INTERNATIONAL UNION, UAW

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The opinion of the court of appeals (R. 151-161) is reported at 393 F. 2d 49. The Board's decision and order (R. 125-150, 52-125) are reported at 145 NLRB 1097.

lations Act. as any workstone at 136 .73 Stat. 519.

On March 5, 1968, the court of appeals filed its opinion denying the petition to review and set aside the order of the National Labor Relations Board dismissing the unfair labor practice complaint, and, on the same date (R. 1), the court entered a judgment in accordance with that opinion (R. 162–163). On April 16, 1968, the court issued a formal decree restat-

ing its earlier judgment (R. 167–168). The petition for a writ of certiorari, invoking this Court's jurisdiction under 28 U.S.C. 1254(1), was not filed until July 6, 1968.

On October 14, 1968 (R. 169), the petition was granted, reserving for decision after argument the question whether the petition was timely. For the reasons discussed *infra*, pp. 28-31, we believe the petition was not filed within the time allowed by 28 U.S.C. 2101(c).

QUESTIONS PRESENTED

- 1. Whether a labor union restrains or coerces employees in the exercise of rights guaranteed by Section 7 of the National Labor Relations Act, in violation of Section 8(b)(1)(A) of the Act, by fining its members for violating restrictions upon incentive earnings previously promulgated in a union by-law and acquiesced in by the employer.
- 2. Whether the petition for a writ of certiorari was filed within the 90-day period prescribed by 28 U.S.C. 2101(c).

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, et seq.), are as follows:

Sec. 7. Employees shall have the right to selforganization; to form, join, or assist labor
organizations * * and to engage in other concerted activities for the purpose of collective
bargaining or other mutual aid or protection
and shall also have the right to refrain from
any or all such activities * * . [29 U.S.C.
157].

Sec. 8(b). It shall be an unfair labor practice for a labor organization or its agents

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: Provided, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein * * ... [29 U.S.C. 158(b)(1)].

STATEMENT

1. Since 1937, Local 283 of the United Auto Workers has been the bargaining representative of the production employees of the Wisconsin Motor Corporation. The current collective bargaining agreement, like many of its predecessors, requires the employees either to join the union and maintain good standing, or to decline membership and pay a service fee to the union (R. 126). About half of the company's 850 production employees are compensated on a piecework or "incentive" basis, which enables them to earn more than their basic hourly wages by producing at a rate in excess of established norms of hourly output (R. 61-62).

Under the collective agreement, all incentive work is classified into five different grades according to the skills involved, and for each grade a minimum hourly rate, called the "machine rate," is established (R. 46, 47, 50). This machine rate fixed in the contract reflects a determination, on the basis of time studies, of the number of pieces of work an average operator would turn out in an hour—after an adjustment for such factors as picking up and cleaning tools, fatigue, and

personal needs (R. 61-62, 22-24, 34). Employees who produce at less than the machine rate are still paid that rate (R. 61, 23). But by taking less time than that allowed for the factors just mentioned, the average operator can exceed the machine rate. Since the company is willing to pay the employee for production in excess of the machine rate, the employee can in this way increase his income (R. 23-24).

In 1944, the members of the local, concerned that the company's incentive system might lead to dissension and might disadvantage older workers (see, infra, pp. 20-23), adopted a by-law requiring that members "turn in no more than 10 cents per hour over and above machine rates" (R. 63). With minor modifications, the rule has remained in force over the years, but the "ceiling" has been raised several times as a result of collective negotiations with the company (see infra, p. 7). In 1946, the membership voted to impose fines for violation of the rule (R. 63, 4).

In its current form, the union's rule provides (R.

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The contract provides (R. 46):

A. Jobs shall be so priced as a result of a time study that the average competent operator working at a reasonable pace shall earn not less than the machine rate of his assigned task There is a lower rate, called the "day rate," which applies in certain situations not relevant here (R. 32, 47) and all of the study o

^{**}This formal rule superseded a "gentleman's agreement," in effect since 1938, which recommended that "pieceworkers turn in no more than time and a half in any one day in order to conserve work and avoid layoffs" (R. 63, 3).

At the time of the Board proceeding, the ceiling rate was between 45 and 50 cents per hour above the machine rate (R. 64, 65n, 11).

A. The basic objective of the Union is, to protect members of the Union in their employment and to give them as much security as the industry can provide. The Local Union in its judgment and reasoning has established a production ceiling which it feels will bring more protection to the members. It follows that a member who is found in violation of this rule is guilty of conduct unbecoming a Union Member.

B. Any member violating these ceilings, shall be subject to a fine of One Dollar (\$1.00) for each violation. The violators shall be processed by not less than 3, nor more than 5 Members of the Executive Board.

In case of persistent ceiling violations, the member will be charged with conduct unbecoming a Union Member.

As the rule has been consistently interpreted and applied, a member does not commit a violation by performing excessive work. Rather, the rule limits what a member may enter on his work card for the purpose of current compensation by the company (R. 64, 11-13). The employee remains free to produce in excess of the ceiling rate, and, if he does, the extra production physically enters the flow of company operations (R. 64, 10-11, 24-25), Insteadof reporting any excess

on the remaining the decided bat and report at for companying, to

^{*}Article 30 of the Constitution of the International Union provides a detailed procedure of charges, trial, and penalty for "conduct unbecoming a member of the Union." The penalty includes suspension and a fine ranging from \$1 to \$100. (R. 51-52.) The fairness of these procedures is not questioned.

production to management for immediate compensation, the union member is simply expected to "bank" his earnings in excess of the ceiling, and hold them in reserve for occasions when he would otherwise earn less than the ceiling (R. 64, 11-12)? The union rule does not, of course, curtail the company's right to require a full day's work from the employee (R. 36-38). Nor does it absolutely prevent the employee from deriving direct benefit from his excess production.

The company does not consider itself bound by the ceilings and the banking procedure, and, if an employee reports all production for immediate payment, the company makes full payment notwithstanding a violation of the union's ceilings (R. 65, 12). Since the ceilings were first promulgated, however, the company has, in a number of ways, acquiesced in their implementation. It permits an employee to bank excess production for later payment (provided that all banks are depleted by annual inventory time) (R. 65, 25), and will pay him for this production during subsequent non-productive periods (R. 26, 10-11). The company has also cooperated with the union in policing the rule it not only supplies the union with the employees' work cards but also pays the union stewards for the time spent in checking the cards (R.

his machine is not operating, the bargaining contract provides that the company will compensate him at either the machine rate of the lover day rate (n. 1, supra), depending on the specific reasons for nonproduction. At these times, the union permits the member to draw upon his "bank," and thus, by collecting for work previously produced but not reported for compensation, to earn the higher ceiling rate for a period during which he produced nothing. (R. 64, 11-12, 27-28.)

67-68, 17). The company has also permitted the union to post the ceilings on plant bulletin boards (R. 4, Tr. 396-397).

Although the ceilings are not contractually binding on the company, they have frequently been the subject of bargaining, with the company proposing their elimination and then compromising on an increase in the level at which the ceilings are set (R. 68, 8-9, 13, 42-43). For instance, the 1953 contract (G.C. Exh. 17) provided that the previous agreement be modified to "Increase the ceilings on all piece work jobs a total of thirteen cents per hour effective July 1, 1953 over the ceilings of piece work jobs in effect on April 30, 1953." Similarly, the strike settlement agreement of August 14, 1956 provided (R. 49) that "The ceilings on earnings is [sic] to be raised ten cents (10¢) per hour above the general increase of 1-1-56 and the ten cents (10¢) of 5-1-56 or a total of 23¢ per hour." Then, again, in the course of the 1959 contract negotiations, the company requested that the ceilings be increased ten cents per hour (R. 13).

In addition, the company uses the ceiling rate as a point of reference in computing the new piece rate after an increase in the hourly peachine rate has been negotiated (R. 69, 17–18). Furthermore, when, as often happens, as a result of constant retooling (Tr. 269), a

The collective agreement provides that the Company shall pay the stewards for time spent on legitimate union business, engaged in during working hours (R. 68). The compliance procedure is set out at R. 65-66.

To achieve that raise in the ceilings, the company agreed to satisfy certain grievances and to increase vacation benefits (R. 849).

piecework job is retimed, the affected employees are guaranteed a minimum rate equal to their previous average earned rate for that job. (Cont. par. 92, Sec. 3(B); Tr. 268-272). Since the average rate for most employees closely approximates the ceiling rate, it—rather than the machine rate—may actually be the de facto basic wage rate (R. 21, Tr. 250, 268-272). Reflecting this fact, the company has passed on grievances involving allowances for specific jobs by relying on whether the employees had or had not "made ceiling" on them (R. 69, Tr. 304-305).

In the light of these and other factors, the Board concluded that "the company as a practical matter has accepted the ceilings as an integral part of the modus operandi and has recognized the ceilings as forming an important element of its negotiated wage structure" (R. 128).

2. In February 1961, the union conducted its semi-

Although company representatives testified that they were opposed to the union's banking system and preferred to let employees "earn as much as they can" (R. 70), they did acknowledge certain management advantages in the system. For example, plant superintendent Bohmann stated that there was a financial saving to the company when an employee draws against his bank for compensation during a "down time" instead of receiving his machine rate (R. 12, 27-28). He also acknowledged that the company's production performance in this industry of high skill and precision was characterized by a low scrap rate, which might well be jeopardized if employees became excessively pre-occupied with sheer quantity of production (R. 71-72, 28-29). Moreover, the company has paid dividends without interruption every year since 1946, when the union first began enforcing its banking system (R. 73). And, despite the union's ceilings the average hourly earnings of the company's incentive employees exceed that of employees in comparable local establishments (R. 20-21).

annual examination of employee work cards (see R. 65-66) and found that six of its members had violated the banking system by reporting to the company, for immediate payment, production at a rate in excess of the ceilings (R. 66, 40-41). The union served written charges upon each of the six members and notified them of their impending trial. As a result of the trials, all six members were fined in amounts ranging from \$50 to \$100. Two members subsequently paid their fines but the four petitioners refused. Instead, they filed unfair labor practice charges with the National Labor Relations Board. It is undisputed that no action has been taken or threatened by the union that would in any way impair or affect petitioners' employment status (R. 127-128, 83).

3. The Board concluded that the union's conduct had not violated Section 8(b)(1)(A) and accordingly dismissed the complaint. Agreeing with the Trial Examiner, the Board held that Congress did not intend by that section to prohibit the type of union discipline here involved (R. 132-136). The court of appeals affirmed R. 151-161).

SUMMARY OF ARGUMENT

I.

A. Section 8(b)(1)(A) of the National Labor Relations Act makes it an unfair labor practice for a union

The members were permitted to have counsel, and there is no contention that the union disciplinary machinery failed to comport with the requirements of fair procedure.

¹⁰ On October 2, 1961, the union filed suit in a Wisconsin state court to collect amounts assessed (R. 53). On February 7, 1968, the trial court dismissed the suit, but the union has appealed. *UAW* v. Schofield, County Court of Milwaukee County, Wisconsin, Case No. 518–597.

to "restrain or coerce" employees in the exercise of rights guaranteed to them by Section 7. In National Labor Relations Board v. Allis-Chalmers Mfg. Co., 388 U.S. 175, the Court held that a union did not commit an unfair labor practice by fining, and seeking judicial enforcement of those fines, against those of its members who worked during an authorized strike. However, in National Labor Relations Board v. Industrial Union of Marine & Shipbuilding Workers, 391 U.S. 418, the Court sustained the Board's holding that it was a violation of Section 8(b)(1)(A) for a union to expel a member for filing an unfair labor practice charge against the union with the Board in violation of a union rule requiring prior exhaustion of internal remedies.

Read together, Allis-Chalmers and Shipbuilding Workers teach the general proposition that union enforcement of legitimate membership rules by reasonable means will not be found to violate Section 8(b) (1)(A) of the Act, unless the union action clearly conflicts with other, predominant federal policies. The present case falls well within this general rule. The court below thus acted properly in sustaining the Board's determination that the union here did not offend Section 8(b)(1)(A) by imposing reasonable fines on those of its members who collected earnings in excess of its ceiling rule, or by suing in a state court to enforce the fines.

B. Under the company's piecework, incentive pay system, an employee who takes less time than that allowed for such factors as fatigue and personal needs can produce at a rate in excess of the norm (the "machine rate") established by time studies, and thereby increase his earnings. Unions traditionally have been opposed to incentive pay systems, fearing that they could result in employees working themselves out of jobs, lowering piece-rates, fostering employee jealousies, and impairing employee health. Reflecting these concerns the union since 1944 has, by membership rule, placed a ceiling on the amount above the established hourly rate which an employee-member may claim as current earnings; the rule further provides for moderate fines against members who violate the ceiling.

As the Board found, a union has a legitimate interest in protecting the job opportunities of its members, avoiding jealousy and dissension among them , and preserving their health. The ceiling rule is reasonably related to achieving these legitimate union objectives and it does so with the minimum impact on employee and employer interests. The rule does not preclude the employee from producing in excess of the ceiling, nor does it keep such excess production out of the company's operations. It merely requires an employee to forego demanding immediate compensation for the excess production, and instead to "bank" those earnings for a later time, when their receipt would be less likely to disrupt employee morale and working conditions.

C. Petitioners opted to become full members of their union, not simply to pay a service fee. Under prevailing standards their membership contractually obliged them to respect the union by-laws, including the requirement of compliance with the ceiling rule.

D. The union's ceiling rule does not encourage or

result in a "slowdown" in any commonly accepted sense. As noted, the rule does not preclude an employee from producing in excess of the ceiling if he so desires. Moreover, the collective agreement merely requires the employee to produce at a level commensurate with the guaranteed hourly or "machine rate." There is nothing in the ceiling rule—which is set well above the machine rate—that would preclude the company from disciplining employees for failing to produce in accordance with the machine rate or to turn out a full day's work.

Nor is the ceiling-banking system in derogation of the collective bargaining process. Although the system was first established by the union more than twenty years ago and is not specifically incorporated in the collective agreement, the facts here show that its development over the years has been a product of bilateral adjustment and compromise. The ceilings have frequently been the subject of collective bargaining between the company and the union, and the system is dependent for its operation upon company cooperation. In sum, as the Board found (R. 128), "the Company of the modus operandi and has recognized the ceilings as forming an important element of its negotiated wage structure."

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on March 5, 1968, when the court of appeals filed its opinion in the case concluding that the petition to review the Board's dismissal of the complaint should be denied, it entered a judgment to the same effect. On April 16, 1968, the court issued a decree which restated the terms of its earlier judgment. The March 5 judgment constituted a full and effective determination of the rights and obligations in suit; the April 16 decree was superfluous, merely restating what had been ordered by the March 5 judgment. In these circumstances, the time specified by 28 U.S.C. 2101(c) for filing a petition for a writ of certiorari ran from the date of the March 5 judgment. The petition is thus untimely, for it was not filed until July 6, 1968, some 123 days after entry of the controlling judgment.

ARGUMENT

L

SECTION 8 (b) (1) (A) OF THE NATIONAL LABOR RELATIONS
ACT DOES NOT PROHIBIT A UNION FROM ENFORCING BY
FINES RESTRICTIONS UPON INCENTIVE EARNINGS SET
FORTH IN ITS BY-LAWS AND ACQUIESCED IN BY THE
EMPLOYER

A. INTRODUCTION: THE STANDARDS SET BY ALLIS-CHALMERS

Section 8(b)(1)(A) of the National Labor Relations Act makes it an unfair labor practice for a union to "restrain or coerce" employees in the exercise of rights guaranteed by Section 7. Under Section 7 employees are guaranteed the right to form, join, or assist labor organizations, and "the right to refrain from any or all such activities." A proviso to Section

8(b)(1)(A) preserves the right of a union "to prescribe its own rules with respect to the acquisition or retention of membership therein."

In National Labor Relations Board v. Allis-Chalmers Mfg. Co., 388 U.S. 175, this Court agreed with the Board that a union does not violate Section 8(b)(1)(A) by imposing fines—and subsequently seeking judicial enforcement of its fines—against those of its members who work during an authorized strike. The Court's conclusion rests principally on the following considerations:

First, Section 8(b)(1)(A) is "only one of many interwoven sections in a complex Act," and thus it must be read in light of the over-all national labor policy fashioned by Congress (388 U.S. at 179-180) (citation omitted). A basic tenet of American labor law is that "the national labor policy [has] vested unions with power to order the relations of employees with their employer" (id. at 181). This necessarily "creates a power vested in the chosen representative to act in the interests of all employees" (id. at 180), and, even though the "employee may disagree with many of the union decisions * * * [he] is bound by them. 'The majority-rule concept is today unquestionably at the center of our federal labor policy'" (ibid.) (citations omitted). An indispensible corollary "to this federal labor policy has been the power in the

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chosen union to protect against erosion [of] its status

* * * through reasonable discipline of members who
violate rules and regulations governing membership"
(id. at 181) (emphasis added).

Second, exhaustive analysis (388 U.S. 184-195) of the legislative history of Section 8(b)(1)(A) and its proviso, as well as of other provisions of the Act, demonstrated that Congress expressly disavowed an intention to impose "limitations with respect to the internal affairs of unions, aside from barring enforcement of a union's internal regulations to affect a member's employment status" (id. at 195). In short, apart from "some internal union rules which on their face are wholly invalid and unenforceable" (id. at 198) (concurring opinion), Congress has generally not sought to regulate under Section 8(b)(1)(A) the internal rules and requirements that the majority of the membership may establish as within their legitimate concern.

Third, the rule in Allis-Chalmers related to a matter of legitimate concern to the union qua union—the preservation of organizational integrity during a strike (388 U.S. at 181–182).

Fourth, the prevailing concept of the relationship between union and member is that of contract (388 U.S. at 182–183). Although the proviso to Section 8(b)(1)(A) speaks only of rules relating to the acquisition and retention of membership, it clearly suffices to preserve the union's ability to impose fines "as a lesser penalty than expulsion" (id. at 191–192) for violation

of the obligations assumed by joining the union. And, nothing in the Act forbids court enforcement of such fines, at least where they are not unreasonable (id. at 192–193), since a "lawsuit is and has been the ordinary way by which performance of private money obligations is compelled" (id. at 192).

The Court did not suggest, of course, that unions are entirely unaffected by Section 8(b)(1)(A) in exercising their disciplinary powers. One example of such a limitation was provided last Term by National Labor Relations Board v. Industrial Union of Marine & Shipbuilding Workers, 391 U.S. 418. In that case, again sustaining the Board's interpretation of the Act and its objectives, the Court held that it is a violation of Section 8(b)(1)(A) for a union to expel a member because he filed an unfair labor practice charge against it with the Board, in violation of a union rule requiring prior exhaustion of internal remedies. The Court reaffirmed its prior holding that "68(b)(1)(A) assures a union of self-regulation where its legitimate internal affairs are concerned" (391 U.S. at 424), but explained that "where a union rule penalizes a member for filing an unfair labor practice charge with the Board, other considerations of public policy come into play" (ibid.). The Court added: "A healthy interplay of the forces governed and protected by the Act means that there should be as great a freedom to ask the Board for relief as there is to petition any other department of government for a redress of grievances. Any coercion used to discourage, retard, or defeat that access is beyond

the legitimate interests of a labor organization" (ibid.) (footnote omitted)."

Thus, Allis-Chalmers states the general rule, defined by the exceptional circumstances of Shipbuilding Workers, that union enforcement of legitimate membership rules by reasonable means does not fall within Section 8(b)(1)(A) of the Act unless the effect of the union's rule would be to impair the fulfillment of some substantial policy embodied in the Act." As this Court has said, in another connection, "The function of striking that balance to effectuate national labor policy is often a difficult and delicate responsibility, which the Congress committed primarily to the National Labor Relations Board, subject to limited judicial review." National Labor Relations Board V. Truck Drivers Union, 353 U.S. 87, 96. The Board's determination in the present case that enforcement of the union's ceiling and banking rule against its members does not constitute the type of "coercion" banned by Section 8(b)(1)(A) fits well within these legal standards governing the Board's function."

Harlan's concurring opinion points out (391 U.S. at 429)—to situations where the grievance charged is not confined to "plainly internal affairs of the union * * " (id. at 424).

reconsider some of the premises on which it rests (see also n. 15, infra).

¹³ See also, *Price* v. *National Labor Relations Board*, 373 F. 2d 443 (C.A. 9), certiorari denied, 392 U.S. 904, sustaining the

B PETATIONERS WERE CONTRACTUALLY BOUND BY THE UNION BY-LAW IMPOSING CELLINGS ON CURRENTLY REPORTABLE PRODUCTION

In Allis-Chalmers, which like the present ease involved a local union organized in Wisconsin, the Court observed that the prevailing American doctrine is that the relationship between union and member is contractual. Petitioners concede (Br. 12) that Wisconsin law recognizes this contractual relationship and permits the judicial enforcement of fines imposed for violation of internal union rules." Thus, it is undeniable that the union by-law involved in this case (supra, p. 5), requiring members to adhere to the ceilings established by the union, "constituted part of the contract

¹⁴See Local 248, UAW v. Natzke, 36 Wis. 2d 237, 153 N.W. 2d 602.

Board's holding that a union does not violate Section 8(b) (1) (A) by expelling a member for filing with the Board a petition to decertify the union as bargaining agent. There, the Board concluded that the deterrent effect of such discipline on the filing of decertification petitions was not sufficient to outweigh the union's vital interest in protecting itself against members who were seeking to undermine it. Compare San Francisco-Oakland Mailers' Union No. 18; ITU (Northwest Publications), 172 NLRB No. 252, 69 LRRM 1157, September 23, 1968, where the Board held that the union violated Section 8(b)(1)(B) of the Act (which bars restraint of "an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances") by fining member-foremen for allegedly misapplying the collective bargaining agreement; the Board ruled that such discipline served no legitimate internal union function and "directly contravened the statutory policy of allowing the Employer an unimpeded choice of representatives for collective bargaining and the settlement of grievances" (69 LRRM at 1159).

between member and union ** Allis Chalmers, supra, 388 U.S. at 182. 1 - Supra, 388 U.S. at 182.

Here, as in Allis-Chalmers, employees who had elected to become full members of the union "failed to comply with a membership rule of long standing, and, after internal union proceedings which were fair and regular, they were lawfully fined moderate sums, ranging from \$50 to \$100. The union has made no effort to affect the members employment status," but only sought to collect the fine by resort to a State court. Hence, this case cannot be said to present the questions left open in Allis-Chalmers, whether Section 8(b)(1)(A) would bar as an unfair labor practice an attempt to collect "unreasonably large fines" or would proscribe "arbitrary imposition of fines, or

noted this aspect of Associated Home Builders.

¹⁵ In the present case, as in Allis-Chalmers, there was a union-security provision in the collective agreement, but in both cases the employees were given the options of becoming members of the union or merely paying dues. The petitioners here elected to become full members. In these circumstances, their contention that they were not "voluntary" union members (Br. 24) and thus not bound by union by-laws is forcelosed by one of the express holdings of Allis-Chalmers (388 U.S. at 196-197).

one of the cases relied on by petitioners (Br. 20) for the proposition that imposing fines for violation of union-set production quotas is an unfair labor practice is Associated Home Builders of Greater East Bay, Inc. v. National Labor Relation Board, 352 F. 2d 745 (C.A. 9). In that case, the union, in addition to fining the members (see N. 25, infra, p. 27), also applied a portion of dues to pay the fines imposed; since, under the union-security contract, non-payment of dues was cause for dismissiff, the Board concluded that this means of implementing the union's rule might impermissibly affect the members' status as employees (352 F. 2d at 747). The dissenting opinion in Allis-Chalmers noted this (388 U.S. at 206). See, also, n. 23, infra, p. 24.

punishment for disobedience of a fiat of a union leader * * *" (388 U.S. at 192-193, 195).

C. THE UNION'S CEILING RULE IS ADDRESSED TO A MATTER OF LEGITIMATE INTERNAL CONCERN

As the Trial Examiner noted (R. 70), unions traditionally have been opposed to incentive pay systems, fearing that they could result in:

(a) employees working themselves out of jobs; (b) the evil of "stakhanovism" under which a new productive norm is set, whereby the piece rate is lowered and the compensation for actual productive effort correspondingly reduced; (c) lower grade employees by excessive dissipation of their allowances, earning more than those in the higher ones, thus dislocating the actual pay scale and bringing about morale-threatening jealousies, as well as undermining the health-protecting purposes of the allowances.

See also Appendix B to the Examiner's Intermediate Report (R. 120-125). The ceiling rule first adopted

The same qualification must be applied to petitioner's citation (Br. 23) of Radio Officers' Union v. National Labor Relations Board, 347 U.S. 17, 40, for the proposition that the Act allows employees to "be good, bad, or indifferent members" of a labor union. This statement was made in the context of the holding that the Act "insulate[s] employees' jobs from their organizational rights" (ibid.), so that it is an unfair labor practice for a union to induce an employer to discharge an employee for violation of a union rule. The instant case is decisively different.

by the union in 1944 and adjusted periodically since—reflects these concerns."

Contrary to petitioners' contention (Br. 16), the Union ceiling rule does not "constitute pure and simple featherbedding designed to provide work for more employees than the job requires." Rather, the rule was intended to discourage some of the union members (e.g., younger and lower grade employees) from skimping on the employer's reasonable allowances for non-production time in the piecework rates, in order to increase their output and current earnings far in excess of what is contemplated by the hourly rates fixed by the collective agreement. The union reasonably feared that, absent a limitation, these members would demoralize and even force the layoff of

The rule itself explains that its objective is "to protect members of the Union in their employment and to give them as much security as the industry can provide" (R. 48). Norman Wold, a Union leader in 1944, testified that the impetus for adoption of the ceiling rule was the fear of older employees that the performance of younger, more vigorous employees would jeopardize their jobs. He added that, "98 percent of the fellows right today are 100 percent for this ceiling because it provides jobs. It provides for not too much pressure working piece work." (R. 44-45.)

¹⁸ Certainly the facts of this case (see, e.g., pp. 5-6, supra) do not support the assertion that the "effect of the union action [in this case] is to promote extreme featherbedding practices

* *** (Br. 20 n. 7).

It may be noted, moreover, that "the legislative history of the Taft-Hartley Act demonstrates that when the legislation was put in final form Congress decided to limit [featherbedding] but little by law." American Newspaper Publishers v. National Labor Relations Board, 345 U.S. 100, 106. See, also, National Labor Relations Board v. Gamble Enterprises, 345 U.S. 117. Cf. Bro. of Locomotive Firemen v. Chicago, Rock Island & Pacific R.R., 69 LERM 2625, November 18, 1968.

tablished by the contract, were unwilling or unable to cut into the non-production allowances; would undermine the health-protecting purposes of the allowances; and would dislocate the pay differentials between the various work grades. It is scarcely necessary to rely on the Board's administrative expertise to conclude that such concerns are essential to a labor union. It would be a gross understatement to say that a union has a "legitimate" interest in protecting the job opportunities of its members," avoiding jealousy and dissension among them, and preserving the wage differentials and health allowances which have been negotiated for them.

The ceiling rule involved in this case is reasonably related to achieving these legitimate union objectives, and it does so with the minimum impact on employee and employer interests. Thus, the rule does not preclude the employee from producing in excess of the ceiling, nor does it keep such excess production out of the company's operations. It merely requires an employee to forego immediate compensation for the excess production, and instead to "bank" those earnings for a later time, when their receipt would be less disruptive." Such a rule, the Board has determined, rep-

¹⁹ See National Woodwork Manufacturers v. National Labor Relations Board, 386 U.S. 612.

Indeed, as the court below noted, the ceiling rule is less severe in its economic impact on union members than the strike rule involved in *Allis-Chalmers*. There the employees were required to forego working altogether, while here "the employees were permitted to work even in excess of ceilings, with the additional earnings [merely] deferred" (R. 159).

resents a reasonable accommodation of interests and the union may, without violating the Act, require its members to respect it.

D. THE CEILING RULE DOES NOT CONFLICT WITH ANY COUNTERVAILING FEDERAL POLICY

1. Petitioners argue at some length (Br 15-18) that the union's ceiling rule encourages a slowdown or limitation of production of the kind which is "not favored by the law"." But this argument is wide of the mark, for petitioners' contentions are ill-suited to this record. As we have seen (supra, pp. 5-6), the union rule in this case does not preclude an employeemember from producing in excess of the ceiling if he so desires, but merely from obtaining immediate payment for his excess production. Moreover, while the inability to obtain such payment may in some cases deter him from producing greatly in excess of the ceiling, the ceiling is set well above the agreed-upon average rate of production. Thus, the ceilings can in no instance cause a "slowdown" or "interference" with production. As the Trial Examiner found (R. 73), there is no suggestion "that the guaranteed hourly rates have been so set that the employee, for the pay he receives, has not given the requisite quid pro quo in production." 22 Nor is there anything in the union's

²¹ The cases relied on by petitioners (Br. 17) indicate only that the Act permits employers some flexibility in responding to authorized slowdowns. See, e.g., General Electric Co., 155 NLRB 208, 220–221; Celotex Corp., 146 NLRB 48, 49.

²² The record shows that, when the company promulgated orders forbidding such practices as card playing and reading during working hours, those orders were fully obeyed, with the

ceiling rule which precludes the company from disciplining employees for failing to produce in accordance with the machine rate or turning out less than a full day's work."

The union rule at issue here merely reflects a collective and concerted unwillingness to forego the reasonable non-work allowances which time studies and the contract have afforded employees (see n. 17, supra).

2. Nor is there substance to petitioners' contention (Br. 19-21) that the ceiling-banking system is in derogation of the collective bargaining process. Petitioners' argument that the union rule offends the Act's policy of promoting collective bargaining rests on the assumption that, simply because the company preferred not to have such a system and it was not

cooperation of the union stewards (R. 36, 38). The company has issued no order barring the early shut-down of machines (R. 37). However, when there is such a shut-down, the remainder of the employee's time is spent in preparing the machines for the next day's production, and the employee is not paid by the Company for such down time (R. 41-42).

²² The cases cited by petitioners (Br. 17), as well as the restrictions referred to by Professor Summers (Br. 18), deal with the conventional slowdown situation, where the employee refuses to produce at the rate fixed by the collective agreement or by established practice; such conduct is generally considered un-

protected by the Act.

In Prints Leather Company, 94 NLRB 1312, the union was found to have committed an unfair labor practice by inducing the employer to discharge the recalcitrant employees as a means of enforcing its attempt to cut back production; it was this attempt to affect status as employees that made the union's conduct unlawful (see supra, p. 19). Such clearly unlawful means were also used in National Labor Relations Board v. Bro. of Painters, 242 F. 2d 477, 481 (C:A. 10) (Br. 20).

incorporated in the collective agreement, the system constitutes an illegal, unilateral alteration of the conditions of employment jointly negotiated by the union and the company. The fallacy most clearly appears from petitioners' argument (Br. 19) that if a particular change "can" be achieved through a collective bargaining agreement it "must" be achieved in that way, or not at all." But the bargaining process includes not only the working out of the formal terms of the collective agreement, but also the making of numerous informal accommodations which augment the formal agreement. See Shulman, Reason, Contract, and Law in Labor Relations, 68 Harv. L. Rev. 999, 1003-1005 (1955). The record in this case demonstrates that the ceiling and banking system is such a bilateral accommodation.

Thus, while the ceiling-banking system is not explicitly incorporated in the collective agreement, the facts summarized in the Statement (*supra*, pp. 6-8) show that its development over the years and its present status are in large measure the product of bilateral adjustment and compromise. As the Trial Examiner found (R. 68, 69):

Among the subjects embraced by the contract negotiations is the setting of the ceiling rate. The purpose of doing so is to bind not the Employer but the Union. The Employer retains its freedom to pay any member who reports production yielding him in excess of ceiling, but the Union binds itself in respect to the limit

²⁴ Compare Fibreboard Paper Products Corp. v. National Labor Relations Board, 379 U.S. 203, 210, 214; National Labor Relations Board v. Katz, 369 U.S. 736, 741-743, 745, 747-748.

which it will permit its members to earn above the guaranteed machine rate. The higher the ceiling the greater the productive leeway. And so in the typical negotiations, the Employer begins by asking the Union to agree to eliminate the ceiling and, as the second alternative, proposes a raise in the ceiling. As an inducement therefor, it may offer a concession in the form of a raise in the guaranteed hourly rate, and the raise in turn conditions the extent to which the Union will agree to raise the ceiling. * *

The status thus achieved by the ceiling program is the product of hard bargaining, however diverse the philosophics voiced at the bargaining table by the respective representatives. * * *

Indeed, petitioners concede (Br. 3) that, "The ceilings were the subject of collective bargaining between the company and the union from time to time."

Moreover, as previously discussed (supra, pp. 6-8), the company recognizes the ceiling-banking system in the daily operation of the plant, cooperating with the union in its implementation. If the employee adheres to the ceilings, the company permits him to bank excess production for later payment, and will pay him for this production during subsequent non-productive periods. The company supplies the union with the employees' work cards so that it can police compliance with the ceilings, and also pays the union stewards for the time spent in checking the cards. The company also uses the ceilings as a basis for making adjustments in the machine rate and for disposing of em-

ployee grievances. Accordingly, this case does not present the situation posited by petitioners (Br. 20), of a union attempting to gain unilaterally, by abuse of its disciplinary power over its members, a pay system which it was unable to achieve through the collective agreement.²⁵

3. In this context, it cannot be said that the interest of the union in enforcing compliance by its members with a by-law must yield, as in Shipbuilding Workers, supra, to some critical statutory policy with which it conflicts. The court below thus properly concluded that the Board's order conformed to the general rule, expressed in Allis-Chalmers, that the union's action in fining its members, and in seeking to collect those fines through court action, was not an unfair labor practice within the purview of Section 8(b) (1)(A) of the Act.

who seek to change a plant practice of long standing which is the product of a bilateral accommodation between the company and the union, and thereby to achieve a result which the company was unable to obtain at the bargaining table—the end of the ceiling system. Significantly, the charges here were filed, not by the company, but by individual employees.

Associated Home Builders v. National Labor Relations Board (supra, n. 16, p. 19), relied on by petitioners (Br. 20), is distinguishable. There the court, without squarely passing upon the question whether Section 8(b) (1) (A) was violated, suggested that the union had violated its bargaining duty, under Section 8(b) (3) of the Act (29 U.S.C. 158(b) (3)), by fining members to enforce a production ceiling unilaterally established by the union and directly contrary to the provisions of the negotiated bargaining agreement (352 F. 2d at 751). As we have shown, the ceiling rule in the instant case has significant bilateral aspects, and it is not contrary to the provisions of the collective agreement.

THE PETITION FOR A WRIT OF CERTIORARI WAS FILED OUT

On March 5, 1968, the court of appeals filed its opinion in this case, upholding without equivocation the Board's dismissal of the complaint (R. 151, 161). On the same day, it entered a judgment providing as follows (R. 162–163):

[I]t is ordered by this Court that the petition to review and set aside the order of the National Labor Relations Board dated May 18, 1964, denying the motion of the petitioners for reconsideration of the decision and order of the National Labor Relations Board dated January 17, 1964, be, and the same is hereby DENIED in accordance with the opinion of this Court filed this day; and upon presentation, an appropriate decree will be entered.

On April 16, 1968, the court issued a decree which simply restated the terms of judgment (R. 167-168).

Although Congress has specified that a petition for a writ of certiorari must be filed "within ninety days after the entry of [the] judgment or decree" (28 U.S.C. 2101(c)), the petition in the present case was not filed until July 6, 1968. We submit that the

The fact that the order entered on this date (R. 62-63) was signed by the clerk, rather than by the circuit judges, is legally immaterial. As this Court has said; "Nor does the fact that the order was prepared by the clerk and bears his signature detract from its quality as a judgment. A judgment is the act of the court' * * even though a clerk does all of the ministerial acts, as here, in conformity with his court's standing instructions." Commissioner v. Estate of Bedford, 325 U.S. 283, 286.

period within which to invoke this Court's certiorari jurisdiction began to run on March 5, 1968, when the court below entered its judgment, and therefore that the petition, which should have been filed by June 3, 1968, was fatally out of time.

In determining when a judgment is final for the purposes of petitioning for review, this Court has stated: "The judgment for our purposes is final when the issues are adjudged. * * * Our test is a practical one. When the case is decided, the time to seek our review begins to run." Market Street Railway v. Railroad Commission, 324 U.S. 548, 551-552." Reiterating this same test in Federal Trade Commission v. Minneapolis-Honeywell Co., 344 U.S. 206, the Court rejected as immaterial the fact that a subsequent order purported to be the "Final Decree", since that order simply "reiterated, without change, everything which had been decided [in the earlier judgment]" (344 U.S. at 212). "The question is whether the lower court, in its second order, has disturbed or revised legal rights and obligations which, by its prior judgment, had been plainly and properly settled with finality." (ibid.). Accord: Federal Trade Commission v. Colgate-Palmolive Co., 380 U.S. 374, 379.

The March 5 judgment in this case satisfies this test. It plainly constituted a full, effective, and unambiguous determination of the rights and duties of the parties. The Board order sought to be reviewed consisted simply of the dismissal of a complaint and con-

²⁷ The Court there held a judgment to be final although the rules of the state court were to the contrary.

tained no affirmative provisions to be enforced. The denial of the petition to review this order on March 5, therefore, left no further occasion for any exercise of discretion by the court below, and the procedural posture of the case together with the decision of the court of appeals made this obvious to all concerned. In these circumstances, we believe that it is immaterial that the March 5 judgment concluded with the statement, "upon presentation, an appropriate decree will be entered" (R. 163), and that such a decree was entered on April 16. For purposes of computing the time for petitioning for certiorari, as this Court has formulated the tests, this second judgment was smoerfluous; it did no more than restate what had been ordered by the March 5 judgment. See Department of

Petitioners contend that they were not notified of the entry of judgment of March 5 (Br. 30). However, they received a copy of the opinion, and they must be charged with knowledge that the Seventh Circuit's rules required immediate entry of a

judgment.

Nor is it significant that the Board did not challenge petitioners' application for an extension of time within which to file a petition for certiorari (Br. 31, n. 16). Since the application was filed before June 3, 1968, and the Board was not opposed to granting the extension sought, it had no occasion to consider petitioner's assumption that the 90-day time period expired on July 15, 1968.

²⁸ Seventh Circuit Rule 14(1), like new Rule 19, Fed. R. App. P. (effective July 1, 1968), provided for the deferred filing of a final judgment or decree only where the court of appeals was enforcing an agency order in whole or in part. Seventh Circuit Rule 23 provided that, "In all cases except that of a decree enforcing the order of an administrative tribunal, judgment shall be entered on the date the opinion is filed" (emphasis added). Here, there was no agency order to enforce as the Board had dismissed the complaint. Nor was there a need, as in the usual enforcement case, for a hiatus in order to formulate an appropriate injunctive decree. Therefore, Rule 23, not 14(1), was applicable.

Banking v. Pink, 317 U.S. 264, 268; Cole v. Violette, 319 U.S. 581, 582.

Application of these jurisdictional standards to this case would not work "a manifest injustice" (Br. 30). Long ago this Court responded to such an argument by noting that, "In these days of rapid communication, the statutory allowance of three months is more than ample for an unsuccessful litigant to determine whether to seek further review." Commissioner v. Estate of Bedford, supra, 325 U.S. at 288. Moreover, the standard manual for practice before this Court expressly advises litigants that in Labor Board cases, even where the Board's order is to be enforced, if the court enters a judgment on the day the opinion is released the time for petitioning "clearly runs from the entry of that judgment", and not from the entry of the subsequent decree. Stern & Gressman, Supreme Court Practice (3d ed. 1962) p. 203, n. 7.20

²⁰ Petitioners rely (Br. 27-28) on Rubber Co. v. Goodyear, 6 Wall, 153, to support the timeliness of their petition. But that decision, long pre-dating the enactment of the 90-day statute involved here, merely held that an appeal had been taken within the proper Term when an earlier order lacked the form or the comprehensiveness of a final judgment (id. at 155). Neither of these defects exists in the March 5 judgment in the present case.

CONCLUSION

The writ of certiorari should be dismissed for want of jurisdiction, or, if the Court determines the petition to have been timely, the judgment below should be affirmed.

Respectfully submitted.

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14.

IN THE

SUPREME COURT OF THE UNITED STATES OCTOBER TERM, 1968

No. 273

RUSSELL SCOFIELD, LAWRENCE HANSEN, EMIL STEFANEC, and GEORGE KOZBIEL, Petitioners,

12.

NATIONAL LABOR RELATIONS BOARD, and INTERNATIONAL UNION, UAW, Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENT INTERNATIONAL UNION, UAW

Opinion Below

The Opinion of the Court of Appeals for the Seventh Circuit is reported at 393 F. 2d 49 and appears in the Appendix at pp. 151-161. The Labor Board's Decision and Order is reported at 145 NLRB 1097 and appears in the Appendix at pp. 125-150.

Jurisdiction

The Opinion of the Court of Appeals for the Seventh Circuit (A. 151-161) and that Court's Judgment (A. 162-163) were entered on March 5, 1968, and a Decree in con-

formity therewith was entered on April 16, 1968 (A. 167-168). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Questions Presented

1. Whether a union restrains or coerces employees in violation of Section 8(b)(1)(A) of the NLRA by fining employee-members for violating a ceiling on incentive-pay earnings promulgated by the union and agreed upon with the employer.

2. Whether the petition for certiorari was filed within the 90-day period prescribed by 28 U.S.C. 2101(c).

Statute Involved

Section 8(b)(1) of the National Labor Relations Act provides that it shall be an unfair labor practice for a labor organization or its agents "to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: Provided, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; "

Statement

In this case certain members of the UAW employed at Wisconsin Mctor Corporation have challenged a Union regulation—in effect since 1944 and periodically bargained with the employer—which sets pay ceilings for all members of the Union earning incentive wages. Evaluation of the pending question must begin with an understanding of the long struggle of the labor movement against incentive

In granting certiorari in this case (89 S. Ct. 120) the Court reserved for further consideration the question whether the petition was timely filed. That issue is fully reviewed in the Brief for the National Labor Relations Board, and we deem it unnecessary to expand on the presentation thereon at p. 9 of our Brief in Opposition.

pay—a struggle from which was born the particular arrangement at UAW Local 283, by which the dangers of incentive pay are sought to be ameliorated by an upper limit on individual incentive earnings.

1. The opposition of labor to incentive pay is familiar history (see, generally, Appendix B to the Trial Examiner's Report, A. 120-125). In the early years of the century and in the formative years for industrial unions, hourly pay became the rallying cry of workers hard-pressed by abuse of incentive schemes resulting in speed-up and worker demoralization. The evils of incentive pay were obvious and numerous-1) the effort to earn a decent wage became a bitter daily contest between workers for maximum personal output; 2) as piece-workers exerted themselves to achieve adequate earnings, employers repeatedly reduced the piece rate in an endless and debilitating "speed-up"; 3) older and physically less capable workers would be fired or required to subsist on limited earnings while younger workers with more stamina would outdistance them on the payroll; 4) pay differentials fostered jealousies and hostilities which further divided industrial workers and helped forestall the unity needed for union organization.

In the 1930's, when organization among industrial workers was first being achieved on a wide and significant front, the evils of incentive pay were further exemplified by the "Stakhanov Movement" in the Soviet Union. In 1935, in an effort to increase industrial production, the Soviet government made a national hero of Aleksey Stakhanov, a coal miner who had achieved an unprecedented increase in his daily mining output. Stakhanovism sym-

[&]quot;Aleksey Stakhanov . . . [was] a coal miner in the Donets Basin, whose team succeeded in increasing its daily output sevenfold. The Soviet Government, anxious to speed up fulfillment of the Five-Year Plan, en-

bolized to industrial unions in other nations the worst excesses of the incentive system. At the very first UAW Constitutional Convention, held in 1935, objections were voiced to the American counterpart of the Stakhanovite speed-up. During the debate on Resolution No. 225, one of whose points was "abolition of speed-up and piece work," the following colloquy ensued:

I would like to state. Down in Kansas City we have the piece work system. They take the fastest man on the job and they base the piece work rate on that fastest man, and I think that is unjust to the entire crew. It makes it impossible for the men to maintain the standard of wages they should be able to maintain...

"President Martin: That is included in the abolition of the piece work system."

2. In the 1930s the UAW met with considerable success in its efforts to replace incentive pay with hourly wages. But after Pearl Harbor the national interest in maximum defense production was urged in some quarters to support renewed use of incentive pay. This gave rise to grave concern within the Union's ranks, reflected in the 'majority report on incentive pay' adopted by the UAW's Eighth Constitutional Convention in 1943.

"Whereas: The workers of the automobile industry, without submitting to the dangers and injustices of piece-work plans, have increased the productivity of

couraged the Stakhanov movement, and Stakhanovite workers received high pay and other privileges. Whether it was spontaneous or not, the Stakhanov movement gained wide following . . . It has been widely criticized outside the USSR as another form of the speed-up system, fought by labor unions throughout the world." Columbia Encyclopedia, 2d Ed., p. 1880.

the auto industry to the highest level in the history of this or any other industry; and

"Whereas: Despite these facts the Automotive Council for War Production, representing management, management spokesmen in the War Production Board, spokesmen outside and inside the union have within the last year inaugurated a drive for the introduction of piece-work systems or so-called incentive plans in the automotive and aircraft industries . . .

"The International Union of the UAW-CIO reiterates emphatically its traditional opposition to the introduction of incentive or piece-work plans in the plants within our jurisdiction where such plans do not exist. The International Union will continue to leave to the autonomy of Local Unions the continuance of piece-work systems in keeping with the minimum standards set forth by the Columbus Board meeting.

"This Convention of the UAW-CIO takes a firm position against extension of incentive pay plans because we believe that piece-work will neither bring our Nation maximum war production for provide workers with an adequate annual wage.

"Piece-work will result only in further aggravating the dislocation and unbalancing of production schedules, resulting in layoffs, unemployment and dissipation of our manpower. Piece-work systems would have the result of further intensifying the problem of wage inequalities and differentials, will block the union's efforts to establish an industry-wide wage agreement based upon equal pay for equal work, and will further demoralize workers who are, at present, getting less money for doing the same work. Piece-work systems would reintroduce the old system of speed-up, in which the worker is robbed of higher earnings through man-

agement's using every insignificant engineering change or pretext to cut rates.

"All the above factors justify the conclusion that the introduction of the piece-work plan will create new labor grievances, add to labor unrest in our vital war plants, and make more difficult the achievement of uninterrupted and maximum production. The membership of the UAW-CIO, as we have many times proved, is vitally interested in achieving maximum production, but are convinced that this objective cannot be achieved through the introduction of piece-work plans

Upon the approval of incentive rates the War Labor Board, UAW locals sought means to ameliorate their dangers. In 1944 the members of UAW Local 283 at Wisconsin Motor Corporation—which pays substantial numbers of its workers on an incentive basis—determined that a formal ceiling should be placed upon members' piece-work earnings. The genesis of this action is described in testimony by the Local's 1944 leader (A. 44-45):

"We talked about well, what are we going to do. We have got to do something. You know, in the shop there around Thanksgiving Day or near Christmas, why there was layoffs and the fellows were getting older. Some of the fellows were getting older and the young fellows would come in and they would push, push, push, push, so we wanted to see that this labor state keep as many fellows working as we possibly could, and we know if we put this thing on there it would provide for at least a few more fellows to stay at work. So we thought the thing over. I'd say that it wasn't any board of directors. It was the group. They voted on it at the union and they have had many

a chance over the years to kick it out or put it in or whatever. In fact, it has been brought up and I'd say ninety eight per cent of the fellows right today are 100 per cent for this ceiling because it provides jobs. It provides for not too much pressure working piece work fellows. I don't know whether you have ever done that or not; but there is always a pressure, a pressure all the time. You want to make out. You want to make as much as you can up to a certain point and we figured well, here's a leaving off period and we made a survey of this district around here number ten. We went all the way to Detroit. We looked at different contracts. We contacted different people to try to get as fair a rate as we possibly could. So we was over to Chicago on the labor board then and—

Q. This was in 1944? A. 19— it was, I think it was.

Q. You so testified, so go ahead. A. We wanted to set up classifications. That's what we did up there, classifications. That's where you get your five grades. So I think Mr. Wurtz and Mr. Todd [respectively Vice President and President of Wisconsin Motor Corporation] and oh, Mr. Olson and myself, maybe another one or two. I think Ray Daniels was there, and we probably went up there maybe three meetings, four meetings, and finally the labor grade was set up and then as we knew, there was a war on, we didn't want to hold back anything, but we also wanted to provide jobs for the fellows. ...

The purpose of the Local 283 piece-rate ceiling was similarly described by Union witness Dale Steinfeldt (A. 43):

[&]quot;. . . production ceilings were one of the main points of disagreement and the union steadfastly held to the principle that we thought that our production workers had just about reached their capacity in productive power and that any increase in the ceilings would result

Following these events, a regular membership meeting of the local resolved on March 19, 1944, that "if, and when, the proposed machine base rates in the contract are approved by the W.L.B., the Union take steps to place a ceiling on piece work earnings. That a limit of 10¢ per hour over and above the proposed machine base rates be included in the next contract" (R. Exh. 9). A month later it was moved and carried at a membership meeting that "men turn in no more than 10 cents per hour over and above the new machine rates" (ibid). In 1946, the membership voted that penalties be imposed in the form of fines for violation of the prevailing piece-rate ceilings (ibid). In 1961 the earning ceiling resolution was approved as a by-law of Local 283 (Tr. 79-82).

3. The Company has long accepted the ceilings applicable to Union members' wages. While it has not itself enforced the ceiling, and has regularly paid every member's validated earning claim even if known to exceed the applicable ceiling, it has taken no disciplinary action against any member who complies with the piece-rate ceiling (A. 67-69). Indeed, the Company has so far acquiesced that it has periodically bargained out the level of the Union incentive ceiling and obtained agreements thereon. For instance, the 1953 contract between the Union and the Company (G.C. Exh. 17) provided that the Union would "Increase the ceilings on all piece work jobs a total of thirteen cents (13¢) per hour effective July 1, 1953 over the ceilings on piece work jobs in effect on April 30, 1953." Similarly, the strike settlement agreement of August 14,

in a hardship or physical, mental and otherwise being placed on them and if the production ceilings were removed or increased to any great extent that this would result in the company making efforts to change the methods used on productive jobs and subsequently reduce the rates and this in turn would result in lesser amount of production employees being employed by the company."

1956 between the Union and the Company (A. 48-49) provided that "The ceilings on earnings is to be raised ten cents (10¢) per hour above the general increase of 1-1-56 and the ten cents (10¢) of 5-1-56 or a total of 23¢ per hour."

In 1965 (after the Board trial of this case) ceilings were again a subject of intensive discussion in the contract negotiations between the Union and the Company. Following fruitless negotiations in sessions on January 18, 22 and 25, the issue was settled on January 26 by an agreement to an increase in the ceiling after the Company had stated that "there can be no settlement unless the ceiling is raised." The formal Agreement of March 19, 1965 on "revisions of the 1962 Agreement . . . to be incorporated"

In the 1956 negotiations the Company first asked for abolition of the ceilings while the Union favored their retention without alteration. The ultimate compromise on a ceiling increase was agreed to after the Company wrote to the Union (R. Exhibit 5) that "The Company is willing to compromise this issue on the following basis: Ceilings shall be increased twelve cents (12¢), however, the Company will be satisfied if the plant average increase for incentive workers is ten cents (10¢) over and above any general increase granted."

⁵ The Union's minutes of the negotiations (which were given to the Company and posted in the plant) show the following for Jan. 26, 1965: "A review of the points remaining showed 10 items still unresolved. Todd asked if the Union will grant a 10¢ ceiling increase. Union said there will be no increase in the ceilings. Todd said there can be no settlement unless the ceiling is raised. Union said the ceiling is good for the Union and the Company and if they are removed it would create absolute confusion. Union said the ceilings are 40 to 50¢ per hour above the timing rate which is considered a fair days work if maintained. Todd read figures that he claimed shows that the spread between the timing rate and the ceilings has gradually diminished. Union said Todd was heard to say yesterday that the ceiling demand was withdrawn and if not he should have raised it yesterday when he made his proposal. Union said it is not fair that Todd should raise this major item at this late hour. Union said our people will not allow any raise in any manner, shape, or form in the present production ceilings. Todd said if there was a ceiling increase allowed under the new By-law it does not show up on the payroll records. Todd said if the Union will raise the ceiling 3¢ per hour we can continue to bargain. Union said we will agree to this. . . ."

into the new Agreement" (see infra, Appendix B., p. 34) stipulated that "The Union agrees to increase the Production Ceilings an additional 3¢" (ibid.). In the most recent negotiations over a new contract it was agreed between the parties on January 31, 1968 that the prevailing ceiling would be increased 5¢ and that increase has gone into effect.

Thus, for some fifteen years there have been formal agreements between the Union and the Company wherein it has been agreed that the piece-rate ceilings applicable to Union members would be maintained at specified levels.⁶

- 4. On the basis of the entire record the Trial Examiner found that the incentive ceiling "is the product of hard bargaining" between the Union and the Company (A. 69). The Trial Examiner also set forth in the following terms the considerations which have led the Union to establish the incentive ceiling (A. 70):
 - "... the Union justifies the ceiling rule on the basis of apprehensions, which, as the literature on the subject would indicate, have their roots in industrial experience with incentive plans of earlier vintage, some, of which have been acknowledged by management spokesmen as having been reasonably grounded... These include expressed concern that a stepped up pace could result in: (a) employees working themselves out of jobs, (b) usher in the evil of 'stakhanovism,' under which a new productive norm is set, whereby the piece

The Company's contractual acceptance of the piece-rate ceilings was specifically noted in the International Union's approval of this Local 283 ceiling by-law. A communication of February 14, 1961 (Tr. 82) from the Chairman of the UAW By-Laws Committee in response to the Local's request for approval of the by-law, stated that: "It is the opinion of the International By-Laws Committee that since the production ceilings are recognized by both the Company and the Union," the by-law "would not be improper or contrary to the provisions of the International Constitution."

rate is lowered and the compensation for actual productive effort correspondingly reduced, (c) lower grade employees by excessive dissipation of their allowances, earning more than those in the higher ones, thus dislocating the actual pay scale and bringing about morale-threatening jealousies, as well as undermining the health-protecting purposes of the allowances."

Concerning the Union's "legitimate interest" underlying the ceiling regulation, the Examiner (A. 113) cited and approved authorities demonstrating "that the setting of production limits among pieceworkers is hardly new in our industrial life, and that it has its roots in experience under piecework and incentive plans giving rise to apprehensions, reasonably grounded, with which such a practice is designed to cope."

5. The Decision of the Labor Board of Jan. 17, 1964 expressly accepts the findings of fact of the Trial Examiner (A. 126) and concludes that no violation of the statute has occurred in this case. The Board particularly emphasizes the periodic bargaining between the Union and the Company over the incentive-pay ceiling, which the Company has accepted "as forming an important element of its negotiated wage structure." As the Board has found (A. 128-129):

"Although the Company does not consider itself bound by the rule, and at various times during negotiations has unsuccessfully sought to induce the Union to drop the ceilings, the Company nevertheless as a practical matter has accepted the ceilings as an integral part of the modus operandi and has recognized the ceilings as forming an important element of its negotiated wage structure. So far as appears, the Company has never sought to discipline any of its

employees for adherence to the Union's ceiling restrictions. The Company uses the ceilings in computing wages and evaluating jobs. Ceilings have also played an important role in the negotiation of collective-bargaining agreements between the Company and the Union. Thus, in 1953, one of the Company's proposals was that the ceilings be increased at least 10 percent. The contract that year made provisions for a 13 cents per hour increase in ceilings. The 1956 strike settlement agreement provided for another increase in ceilings. In 1959, the Company made no request for the elimination of ceilings, but only requested that they be increased 10 cents.

"Moreover, while abstaining itself from enforcing the ceiling rule, the Company voluntarily aids and cooperates with the Union in the administration of the rule. Thus, the Company joins in the "banking" procedures by making the necessary bookkeeping entries. The Company also allows the ceilings to be posted on its bulletin boards. And it assists the Union in policing enforcement of the rule by making available to the Union the members' production records and allowing the union stewards to inspect such records on Company time without loss of pay."

6. The majority in the Court below finds this Court's decision in Labor Board v. Allis-Chalmers Manufacturing Co., 388 U.S. 175, dispositive in favor of an affirmance of the Board's ruling. In reaching that conclusion the Court does not purport to apply Allis-Chalmers in any rubber stamp fashion. On the contrary, the opinion carefully reviews and approves the Board's finding that "ceiling rules derive from a legitimate, traditional interest in union objectives," having to do with the effect of unrestricted incentive pay upon employment security, employee morale,

and employee health (A. 157). The Court concludes (A. 158) that the union rule here in issue "has a rational basis, and we cannot say that it was not reasonably calculated to achieve a permissible end," and "since the end here was a legitimate union objective and the means were appropriate to enforce it, our hand should be stayed." Thus the case comes to this Court with Trial Examiner, Board and Court below all finding legitimate Union purpose validating the Union rule questioned here.

Summary of Argument

A

Entirely legitimate interests of unionism are advanced by a by-law imposing a ceiling on members' incentive-pay earnings. In the exercise of the statutory power of unions to make binding judgments concerning the interests of all employees they represent, it has been the consistent judgment of industrial unions that hourly pay which discounts entirely individual differences in employee productivity best serves the workers' interests. Individual productivity wage is now not the rule but the exception in industrial labor relations.

A union has indisputable statutory power by negotiation of straight hourly wages to discount entirely an individual's high productivity, even for employees who have never voted for or joined the organization. As a necessary corollary, it seems clear that a union legally empowered to deny productivity pay to non-members may lawfully set a maximum on productivity pay of its own members. Excessive productivity-pay differentials which arise in the absence of a piece-rate ceiling often cause rivalry and bad feeling in the plant; even worse from the union's standpoint, the hostilities engendered by unrestricted productivity-pay differentials create a problem of real con-

cern for the union as an operating a sociation seeking to avoid internal frictions, particularly between older and younger members. There can thus be no gainsaying the record and multiple findings in this case concerning the legitimate trade union interests which underlie the by-law here in issue.

R

The statutory requirement that wages and working conditions be bargained between the union and the employer: was fully met in this case. Petitioners' efforts to shift the emphasis of their argument from their own rights as dissenting unionists to the collective bargaining rights of the employer cannot succeed; the plain and simple answer to their new emphasis is that there is before this Court the amply-supported finding of the Labor Board that the piece-rate earning ceilings applicable to Union members have been repeatedly bargained out and accepted by the employer. Indeed, the Wisconsin Motor Corporation has so far accepted the earning ceilings applicable to Union members that it has not only assisted the Union in their implementation in various ways, but has fully and repeatedly bargained the amount of the ceilings, securing, increases for the duration of successive collective bargaining agreements. Since the Board's finding that the Company has accepted the piece-rate ceilings is fully supported by the record, petitioners cannot invalidate this Union by-law on the theory that it invades the collective bargaining rights of the employer.

We have thus demonstrated that the Union by-law challenged in this case reflects wholly legitimate interests of the Union and its members and that the bargaining requirements of Section 8(b)(3) with respect to wages and working conditions have been met here by 15 years of consecutive negotiations between the Union and Company.

Upon these facts there remains no room, we would submit, for finding a violation of Section 8(b)(1) of the statute. That is the import of the decision of this Court in Labor Board v. Allis-Chalmers Manufacturing, Co., 388 U.S. 175, which requires an affirmance of the holding below.

7

A union rule which is not ultra vires may be enforced by discipline on union member under Section 8(b)(1) unless it invades employer or public rights protected by Section 8(b) provisions. The key to the applicability of Section 8(b)(1) lies neither in the form of discipline employed nor Labor Board judgments concerning the merits of desirability of a challenged union rule. Rather, we suggest that a different guiding principle emerges from this Court's decisions in Allis-Chalmers and Marine Workers: where specific provisions of Section 8(b) secure freedom from union restraint, union discipline impairing such freedom may infringe Section 8(b)(1)(A) notwithstanding the proviso, but in no event does a violation arise from the claim by a union member that Section 7 gives him a general "right to refrain" from union rules. Within the area of membership regulation in the legitimate interests of the union and its members, it appears clear that the statute will not permit Labor Board intrusion on any theory that union members have a "protected" Section 7 right to defy their union's rules. Section 8(b)(1) in its "restrain or coerce" proscription does not grant employees the right to be union members on their own terms, abiding only by those union rules with which they agree or which the Labor Board and the courts might uphold as reasonable or desirable.

While within the area of legitimate union concern regulation of members is thus wholly preempted from Section 8(b)(1) restriction, no such immunity is found where the union rule enforced upon the member has the effect of transgressing specific guarantees found in other provisions of Section 8(b). The applicability of the Section 8(b)(1) exemption for union regulation thus turns upon whether the regulation is confined to the area of union concern over the members' conduct or reaches beyond it to transgress the statutory rights of others protected under Section 8(b). In that event only does union discipline lose the exemption from Section 8(b)(1). Since the Union by-law here at issue is justified from any point of view in the interest of the Union and its members and does not infringe the statutory rights of the employer or the public protected by Section 8(b), the decision of the Trial Examiner, the Labor Board, and the Court below should be sustained.

Argument

In its earlier stages the litigation of this case centered upon a claimed distinction between the mere assessment of fines against the petitioners and the Union's efforts to collect those fines through judicial suit. Petitioners in this Court now largely abandon that distinction—as they must after the holding in Labor Board v. Allis-Chalmers Manufacturing Co., 388 U.S. 175, that suit for collection of union fines is not "coercion" forbidden by Section 8(b) (1). Accordingly, we do not repeat the argument we made to this Court in Allis-Chalmers on the question of judicial collection of union fines.

⁷ We note for the information of the Court that the Union's state court suit which first gave rise to this case has recently been dismissed. A judgment was entered by the County Court for Milwaukee County on June 12, 1968, dismissing UAW v. Scofield (Case No. 518-597) in conformity with an opinion of that Court of February 7, 1968. The opinion found that Scofield having earlier been suspended from mem-

Petitioners do, however, assert that this case differs from Allis-Chalmers because 1) the underlying goal of the piecerate ceiling by-law is less legitimate or worthy than the strike-solidarity rule there involved, and 2) collective bargaining requirements are violated by the Union by-law here in issue. In the first two points of our Argument we answer these claims; in the concluding point we tender a construction of Section 8(b)(1) which would clearly differentiate union membership rules which Congress intended to keep outside the Labor Board's purview from those transgressing employer or public rights protected by the Act and needful of Labor Board vindication.

I

Entirely Legitimate Interests of Unionism Are Advanced by a By-Law Imposing a Ceiling on Members' Incentive-Pay Earnings.

In the area of wages, hours and working conditions, a union has indisputable power to make binding judgments concerning the interests of all employees it represents.8 In

bership by virtue of a former failure to pay sixteen dollars in fines, he was not subject to membership discipline in April of 1961 when the Union assessed the \$100 fine in issue in this case. An appeal by the Union is pending in the Circuit Court for Milwaukee County.

⁸ As this Court emphasized in Allis-Chalmers, 388 U.S. at 180, national labor policy "extinguishes the individual employee's power to order his own relations with his employer and creates a power vested in the chosen representative to act in the interests of all employees. 'Congress has seen fit to clothe the bargaining representative with powers comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents. . .' Steele v. Louisville & N.R. Co., 323 U.S. 192, 202. Thus only the union may contract the employee's terms and conditions of employment, and provisions for processing his grievances; the union may even bargain away his right to strike during the contract term, and his right to refuse to cross a lawful picket line. The employee may disagree with many of the union decisions but is bound by them. 'The majority-rule concept is today, unquestionably at the center of our federal labor policy.' 'The com-

the exercise of that statutory power it has been the consistent judgment of industrial unions reflected in the amoual regotiation of thousands of collective bargaining agreements throughout the nation—that hourly pay which discounts entirely individual differences in employee productivity best serves the workers' interests. Indeed in recent years there has been continuing decline in the number of industrial employees still earning incentive pay. In 1958 in manufacturing industries throughout the nation the proportion of workers paid incentive wages was 27% (BLS, Department of Labor, Monthly Labor Review, Vol. 83, No. 5, p. 460). By 1966 that figure had dropped to 16.5% according to a Labor Department study of incentive workers in manufacturing industries (see Appendix A. infra, p. 33). The study found a high of 26.4% of workers on incentive pay in New England to a low of 1.7% on the Pacific Coast. Thus, with five out of every six industrial workers now paid straight hourly wages, it is manifest that our federal labor law in no sense enshrines the "freedom of an individual to excel" principle which petitioners cite to this Court from a state court ruling (Brief for Petitioners, p. 18). Individual productivity wage is now not the rule but the exception in industrial labor relations.

Thus a union has indisputable statutory power by negotiation of straight hourly wages to discount entirely an individual's high productivity, even for employees who have never voted for or joined the organization. The piece-rate earnings ceiling here in issue is therefore doubly an a fortiori case of permissible union regulation. First, at

plets satisfaction of all who are represented is hardly to be expected. A wide range of reseasableness must be allowed a statutory hargaining representative in serving the unit it represents, subject always to complete good faith and housety of purpose in the exercise of its discretion.'

Perf. Motor Ca. v. Haffman, 345 U.S. 830, 338."

Wisconsin Motor Corporation the Union has agreed that half of the work force shall be compensated on a piece-rate basis, and in this respect petitioners are already permitted productivity pay increments denied their fellow employees paid hourly wages. Second, petitioners joined the Union, though they did not have to do so under the statute (see 388 U. S. at 197, n. 37; A. 82-83) and the "service fee" option agreed to between the Union and the Company. Accordingly, unlike employees required as such to accept union determinations in the negotiation of their wages, petitioners made their own decision to belong and to accept union rules, including the piece-rate ceiling by-law. Surely in the area of wages majority rule is not less binding on those who opt for it within the union than on those who have it thrust upon them merely as employees for whom the union is the statutory bargaining representative. Thus it seems clear that a union legally empowered to deny productivity pay to non-members may lawfully set a maximum on the productivity pay of its own members.

Moreover, unions are even more concerned to prevent excessive productivity-pay differentials among their own members than among workers whom they represent merely as employees in the bargaining class. Even in the plant excessive pay differentials which arise in the absence of a piece-rate ceiling often cause rivalry and bad feeling—particularly in the ranks of older employees unable to work at a pace comparable to young men in their teens and twenties.

^{*}Control of members' earnings has been a time-honored power exercised by labor unions in the common interest of their members. The usual context has been concern to prevent union members accepting employment at unduly low pay. That, for instance, was the situation in the 1867 New York case cited by this Court in Allie Chalmers (p. 182, n. 9), where a fine was judicially enforced against a member who worked below the union rate. Master Stevesfores' Asea. V. Walsh, 2 Daly 1. Union control of members' wage-rights was also the nub of this Court's opinions in Elgin, Joliet v. Burley, 325 U.S. 711 and 327 U.S. 661.

But within the union the same workers are not merely fellow employees; they are politically and socially allied to promote their mutual interests. There the hostilities engendered by unrestricted productivity-pay differentials create a problem of real concern for the union as an operating association, and a "generation gap" from pay differentials favoring the younger member is very much to be avoided. As stated by an eminent authority, piece-work limits "protect the union from being weakened by jealousies and dissensions" arising from pay differentials (A. 121). In sum, legitimate interests of unionism long recognized both in theory and practice support a by-law placing an upper limit upon union members' incentive-pay earnings and the Board so found in this case (see supra, pp. 10-11). The Court below (A. 157-158) added its own endorsement of the administrative finding that such ceiling rules as this "derive from a legitimate, traditional interest in union objectives." 10

Nor can the record and findings concerning the legitimacy of this challenged by-law be overcome by petitioners' eleventh hour "featherbedding" accusation. We find it

¹⁰ It is noteworthy that the rule here in issue is far less severe in its economic effect on employees than was the "no strikebreaking" rule in Allis-Chalmers. The ceiling rule does no more than to hold to a reasonable pay maximum workers who because of exceptional working speed and endurance would otherwise outdistance others on the payroll. By contrast, the Allis-Chalmers rule barred any remuneration at all to union members during a strike, and even subjected them to the risk of the employer's filling their positions with permanent replacements. Compared to the employment and earnings impact of that rule, the incentive pay by-law here is modest indeed.

¹¹ In their effort to turn this into a "featherbedding" case petitioners (Brief, p. 3, n. 2) quote the dissenting opinion of Board Member Leedom to the effect that "The record shows that the Union's production ceilings have reduced and slowed down production, that an employee can base the production ceiling in 5 hours, and that the employees have read books played eards and talked in the remaining time." Neither the Trial Examiner nor the Board found such facts and they are not

noteworthy that this extravagant and inapposite appellation was never employed by petitioners during the six years that this case progressed through the Labor Board and the Court below. Their last minute resort to the "featherbedding" charge, entirely without foundation in the record, is the more surprising since the Trial Examiner's report specifically contrasted the incentive-pay ceiling in this case with featherbedding practices. As the Examiner stated it (A. 115, emphasis supplied):

"Underscoring the irrelevance of the social appraisal of a given practice to an adjudicative proceeding is the fact that even after a committee of Congress has heard all viewpoints on a given matter and concluded that a practice is undesirable, between the conclusion and the enactment there is a long and uncertain path. In point is featherbedding, to which I have alluded. In contrast with the practice here involved, of which I have found no mention in the record of the extended hearings in 1947 preceding the drafting of the bills, Congress heard a good deal of testimony on featherbedding."

sustained by the record. Indeed, the Trial Examiner's Report specifically pointed to evidence indicating that at Wisconsin Motors employee productivity "compares favorably with that of the work forces in the other establishments" in the same region (A. 72). Even the single witness who testified that there had once been reading and card playing in the plant conceded that it had ceased (A. 36). Moreover, his testimony (A. 33) about idleness before closing time—asserting that the piece-rate production line stops at 1:45 P.M.—is offset by competent testimony that the remaining time before the end of the daily shift at 2:55 P.M. is used by the men to clean and service machinery and prepare materials for the next day's production (A. 41-42). Finally, even if piece-rate workers do have some idle time during this last hour and ten minutes of the work day, it must be noted that the Company's own piece rates provide 48 minutes a day for "personal time" and "fatigue time" to be used as and when the employee desires (A. 34-35); it is understandable that men who have been producing steadily since 7 A.M. with only 10 and 15 minute lunch breaks (A. 35) take their 48 minutes of "personal time" and "fatigue time" upon the conclusion of their daily labors.

That same contrast is found in a passage from an eminent authority quoted by the Court below (A. 158), that the purpose of pay limits applying to piece-workers "is not primarily to make work but partly to protect the union from being weakened by jealousies and dissensions arising from the fact that some workers receive better jobs than others, partly to prevent foremen from playing favorites in assigning jobs, and partly to prevent employers from cutting liberal piece rates or from using the high earnings of some workers as an argument against a general increase in piece rates." 12

In short, there can be no gainsaying the record and multiple findings in this case concerning the legitimate interests which underlie the challenged Union by-law, and which entirely negate petitioners' "featherbedding" charge. Equally lacking in merit—as we next demonstrate—is petitioners' alternative suggestion that the challenged by-law is unlawful not because it invades their own rights but because it violates the statutory bargaining duty owed to the Wisconsin Motor Corporation.

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between the featherbedding practice Congress has forbidden and the by-law in the present case. Even the narrow proscription of Section 8(b)(6) concerning pay for "services which are not performed or not to be performed" was held by this Court (Labor Board v. Gamble Enterprises, 345 U.S. 117) to tolerate the hiring of local "stand-hy" orchestras during concerts given by out-of-town orchestras—a construction which Senator Taft conceded "was probably right" (Hearings on Proposed Revisions of the Labor Management Relations Act, Senate Committee on Labor, 33rd Cong., 1st Sess., pt. 1 at 258). It is a far cry indeed from this Union by-law limiting pay for services which are performed, to the Congressional ban on a union requiring pay for services not performed.

II

The Statutory Requirement That Wages and Working Conditions Be Bargained Between the Union and the Employer Was Fully Met in This Case.

Throughout the extensive litigation of this case before the Labor Board and the Court below, petitioners' major theme was that the statute protects a union member's "right to work" from restriction by "coercive" union fines enforcing an earnings ceiling. In the wake of this Court's Allis-Chalmers decision rejecting a similar broad "right to work" claim and the finding by the Court below of the degitimacy of the challenged by-law in the members' common interest, petitioners have made a major shift of emphasis. Now they urge that it is not so much their own rights as dissenting unionists as the collective bargaining rights of the employer which they seek to vindicate here. They state that if the Union "wishes to impose production limitations, earnings ceilings, or any similar term or condition of employment, it can and must achieve this purpose through the usual collective bargaining process" (Brief for Petitioners, p. 19). Conceding that the Union is "privileged" to "negotiate upper limits on incentive pay [and] the Petitioners would be bound by any such agreement" (id. at pp. 6-7), it is urged that this by-law violates the statute because it "by-passes the normal collective bargaining process and thus is inimical to the policy of the Act" (id. at p. 9).18

¹⁸ The same collective bargaining point is made even more sharply in the Brief of Amici Curiae, Wisconsin Manufacturers Association, et al. (p. 9):

[&]quot;That some segments of the union movement have held a traditional position in opposition to incentive pay programs cannot be denied. That this position may be said to be consistent with legitimate union objectives' also may be admitted. But, it is submitted, the Board and the lower court have both missed the precise point

We may concede for the purpose of argument that under Section 8(b)(3) a union cannot refuse to bargain with the employer concerning a by-law which imposes production restrictions on member-employees a proposition cogently espoused by the Ninth Circuit's decision in Associated Home Builders v. NLRB, 352 F. 2d 745. We would concede also that if a union refuses to bargain on a productionlimit by-law, and thus violates Section 8(b)(3), fines upon members to enforce the by-law would violate Section 8(b)(1). See discussion infra at pp. 29-31. But we do utterly deny the premise of petitioners' argument that in the present case the collective bargaining requirements of Section 8(b)(3) have in any way been invaded by the challenged by-law. Before this Court there is the amply-supported finding of the Labor Board that the piece-rate earning ceilings applicable to Local 283 members have been fully and repeatedly bargained out and the employer has accepted the ceitings at agreed dollar levels for the duration of the collective contract.

Indeed, the record makes clear that the Company's interest in production is met in numerous respects: Firstly, it is doubtful whether the employer's interest in maintaining efficient employee production is impaired at all by the by-law, which does not impose a limit upon a member's production but only his drawing of pay for production above the applicable ceiling. In the provision for the "banking" of the extra production for future pay during "down" time there is incentive for members to continue to produce even if they have reached their daily earnings

on this argument. If it is said that regulation of production is a legitimate aim of the union in that it protects jobs for more members, then it is identical in quality with the other legitimate aims of unions such as recognition, union security, seniority, grievance procedures, etc. Consequently, the issue is not whether the aim is legitimate, but whether, assuming its legitimacy, the union can handle it unilaterally—outside the collective bargaining agreement."

ceiling. Secondly, should an employee refuse to produce a fair day's work under a union pay ceiling the employer is free to discipline of discharge the worker, and in this sense it is to be doubted whether any union by-law can effectively invade the employer's right to production. Finally, and most importantly, the Wisconsin Motor Coroporation has so far accepted the earning ceilings applicable to Union members that it has not only assisted the Union in their implementation in various ways; but has repeatedly bargained the amount of the ceilings, securing increases for the duration of successive collective bargaining agreements: Such increases were formally agreed to by the Union and the Company in the 1953 collective bargaining agreement, in the 1956 strike settlement agreement upon the terms of the new contract, in the 1965 agreement to contract modifications, and in the 1968 negotiations (see supra, pp. 8-10).

On this unchallengable record, no credence can be given to petitioners' unsupported contention (Brief, p. 20) that the Union is imposing "its own conditions of employment of whether or not they are accepted by the employer in collective bargaining," for the incentive ceilings have been negotiated between the Company and the Union for some fifteen years. Concerning the interplay of union by-laws and the collective bargaining obligations of Section 8(b)(3) petitioners do present an interesting case, but it is not this case. Since the Board's finding that the Company has accepted the piece-rate ceilings is fully supported in the record, while the contrary contention finds no support at all, petitioners cannot invalidate this Union by-law on the theory that it invades the collective bargaining rights of the employer.

What is thus before the Court is a by-law supported by wholly legitimate interests of unionism and in no wise violative of the rights of the Wisconsin Motor Corporation.

Such a by-law, as we demonstrate in our concluding point, does not transgress Section 8(b)(1) of the National Labor Relations Act.

Ш

A Union Rule Which Is Not Ultra Vires May Be Enforced By Discipline on Union Members Under Section 8(b) (1) Unless It Invades Employer or Public Rights Protected by Section 8(b) Provisions.

We have demonstrated in the foregoing discussion that the Union by-law challenged in this case reflects wholly legitimate interests of the Union and its members, and that the bargaining requirements of Section 8(b)(3) with respect to wages and working conditions have been met here by fifteen years of consecutive negotiations between the Union and the Company. Upon these facts there remains no room, we would submit, for finding a violation of Section 8(b)(1) of the statute. That is the import of the decision of this Court in Labor Board v. Allis-Chalmers Manufacturing Co., 388 U.S. 175. In Labor Board v. Industrial Union of Marine & Shipbuilding Workers, 391 U.S. 418, 424, this Court recently restated the nub of its Allis-Chalmers ruling: "5 8(b)(1)(A) assures a union freedom of self-regulation where its legitimate internal affairs are concerned." And the same opinion (ibid.) emphasizes. that a Section 8(b)(1) violation arises from union discipline only where the union rule it enforces on the member "is beyond the legitimate interests of a labor organization." The Trial Examiner, the Board, and the Court below, all found legitimate union interests to inhere in the by-law challenged in this case, and we are confident that this Court will take a similar view. On its face, therefore, the ruling in Allis-Chalmers requires an affirmance in this case. But, in the wake of this Court's recent holding in Marine Workers, it appears appropriate to go beyond the generalization that a given union rule reflects "legitimate interests" of unionism to seek a standard for measuring legitimacy. To that end we suggest that there is an available and workable measure for determining whether a union rule falls within the area of its legitimate internal affairs or interests and the consequent immunity afforded by the proviso to Section 8(b) (1) (A).

At the outset it is clear that the distinction between the union regulation of members which is exempted from Board jurisdiction under the Section 8(b)(1)(A) proviso and that which is not so exempted is not dependent upon the form of union discipline employed to enforce the underlying union rule. Thus, while the Section 8(b)(1)(A) proviso speaks only of union control over "retention of membership," Allis-Chalmers made clear that a by-law within an area of legitimate union concern can be enforced by such lesser and traditional means as union fines, without losing the exemption Congress sought to preserve for internal union affairs. By way of contrast, where a member was expelled from the Union for conduct this Court found to fall outside the area of legitimate union concern, Marine Workers declined to apply the exemption of the Section 8(b)(1)(A) proviso

that is not to say that a union can excuse resort to employment sanctions or physical violence as forms of union discipline; Congress outlawed these particular actions in enacting Section 8(b)(1). See Labor Board v. Drivers, 362 U.S. 274. It is the resort to employment sanctions which led to the finding of a violation in Printz Leather Co., Inc., 94 NLRB 1312, a case on which petitioners place much reliance. Indeed, all apart from that resort to a sanction forbidden by the statute, the cost involved an employee who was not a union member (see 94 NLRB at 1327, n. 23) and thus the Section 8(b)(1)(A) proviso question was reconstituted in any way. Petitioners' reliance on the Printz Leather ruling that a non-union employee has a Section 7 "right to work" free from union coercion begs the point here—that when it comes to union members the Section 8(b)(1)(A) proviso expressly exempts them from the ban on union restraint of "employees in the exercise of the rights guaranteed in Section 7".

even in its most literal sense. Accordingly it seems clear that the form of union discipline is not controlling, this Court having held discipline not expressly mentioned by Congress to be encompassed within the intended exemption where genuine union regulation is involved, while a form of discipline falling within the express exemption was held forbidden where the rule fell outside the area of legitimate union concern:

Nor, we submit, is the guide to Section 8(b)(1)(A) to be found in anything as loose as petitioners' suggested recourse to general policy considerations or judicial evaluations of the merits of union regulations.18 Where Congress has granted jurisdiction—as in the anti-trust laws—this Court has occasionally resorted to a "rule of reason" to define the outer limits of that grant. But the present issue concerns not a grant but rather a restriction of jurisdiction. To accept petitioners' suggestion of a substantive review standard would be to transform a clause preserving from Board intrusion "the right of a labor organization to prescribe its own rules . . . " into a clause upholding "the right of a labor organization to prescribe those rules which can win approval from the National Labor Relations Board." As this Court noted in rejecting so broad a Board jurisdiction in Allis-Chalmers, even when it enacted the 1959 Landrum-Griffin provisions after a thorough review of the entire subject, Congress chose only to grant procedural protections in the area of union membership regulations (388 U.S. at pp. 193-195). The fatal defect of the "policy" test offered by petitioners is that it would put the Board precisely into the business of reviewing and supervising union regulations which Congress in enacting Section 8(b)(1) clearly intended the Board not to undertake.

¹⁵ As the Trial Examiner noted, petitioners' suggested rule "envisages a power in us [the Board] to pass upon whether a union rule is 'reasonable' under a test which includes an appraisal of its social desirability" (A. 60).

If the key to the applicability of Section 8(b)(1) is neither the form of discipline employed nor Labor Board judgments concerning the merits or desirability of a challenged union rule, what then is the guiding principle? We suggest that where specific provisions of Section 8(b) secure freedom from union restraint, union discipline im pairing such freedom may infringe Section 8(b)(1) notwithstanding the proviso, but in no event does a violation arise from the claim by a union member that Section. 7 gives him a general "right to refrain" from union rules. Of course, in recluding resort to Section 8(b)(1) of the statute through a union member's claim of a right to refrain from union rules, the Act assumes that there is in fact a genuine union rule underlying the discipline imposed upon the member. Such would not be the case if, beyond the area of union interests and affairs, a union sought to govern members in their exercise of personal or constitutional rights. Thus, a by-law could not fairly be defended as a union membership regulation if it sought to restrict the individual's personal liberties outside the ambit of the union hall and the work relationship, such as the right to worship, to vote, to associate and to conduct his personal affairs. While the union has a wide ambit of concern to assure membership solidarity in the common interest, there is a point at which the concept of ultra vires applies to secure the member from organizational intrusion upon his individual affairs and freedoms.

But within the area of membership regulation in the legitimate interests of the union and its members, it appears clear that the statute will not permit Labor Board intrusion on any theory that union members have a "protected" Section 7 right to defy their union's rules. What Section 8(b)(1)(A) precludes from Board authority is precisely the Section 7 argument tendered in this case in

the dissenting opinion of Board Member Leedom (A. 141), to the effect that: "In refusing to abide by the Union rule, the employees were exercising their Section 7 right to refrain from Union activity. In fining the employees, the Union was attempting to force these employees to cease exercising that Section 7 right." As this Court found in Allie-Chalmers, acceptance of such reasoning simply emasculates the exempting purpose of the Congress emphasized by the provise to Section 8(b)(1)(A). Section 8(b)(1) in its "restrain or coerce" prescription does not grant employees the right to be union members on their own terms, abiding only by those union rules with which they agree or which the Labor Board and the courts might uphold as reasonable or desirable.16

While within the area of legitimate union concern regulation of members is thus wholly preempted from Section 8(b)(1) restriction, no such immunity is found where the union rule enforced upon the member has the effect of transgressing specific guarantees found in other provisions of Section 8(b). For instance, the protection of Section 8(b) (2) against a union causing an employer to discipline an employee except for non-payment of dues cannot be avoided by a union rule which applies a member's dues payments to an unpaid disciplinary fine, causing him to be in arrears on his periodic dues and subject to employer discharge (Bay Counties District Council, 145 NLRB 1775, enf'd. 352 F. 2d 745). Similarly, Section 8(b)(3) requiring collective bargaining with the employer on wages, hours, and working conditions, may be violated if the union adopts a rule impinging on employer rights and

Illustrative of union regulations which Congress clearly sought to preserve from Board review under Section 8(b) (1) is Minneapolis Stor and Tribune Co., 109 NLRB 727, where a union member was fined for refusal to attend meetings and perform picket duty during a strike. To make such discipline a violation of the statute would simply outlaw union enforcement of membership rules.

declines to negotiate thereon with the employer; enforcement of the union rule upon the member in such a case would violate Section 8(b)(1) (see Associated Home Builders v. NLRB, 352 F. 2d 745). In like vein, disciplinary enforcement of a union regulation violates Section 8(b) (1) if it would require the member to engage in a secondary boycott violating Section 8(b)(4) (Bricklayers Local No. 2 (Robert L. Willis), 166 NLRB No. 26) or picketing forbidden by Section 8(b)(7). Marine Workers is another example of a specific protection by the statute of an interest beyond that of the dissident member-employee—the interest of the Board and the public in free access to the statutory process.¹⁷

These examples illustrate that Congress in safeguarding union regulation of members from Labor Board review did not go so far as to grant unions immunity by membership discipline to violate Section 8(b) rights—particularly the rights of employers and the public. Statutory freedom of internal union regulation cannot be stretched so far as to support union discipline requiring the member to transgress the rights of others which the statute expressly protects. That, in substance, we deem to be the holding of this Court in Marine Workers.

In sum, the applicability of the Section 8(b)(1)(A) exemption for union regulation turns upon whether the regulation is confined to the area of union concern over the members' conduct or reaches beyond it to transgress the statutory rights of others protected under Section 8(b).

Section 8(b) was transgressed by union discipline of a member for filing a charge with the Labor Board; but the right of access to the Board secured by Section 8(a) (4) against employer interference was read into Section 8(b) by implication in rulings of the Board and reviewing courts. See Local 138 IUOE (Charles Skura), 148 NLRB 679, 681-682; Roberts v. NLRB, 350 F. 2d 427, 428.

In that event only does union discipline lose the exemption from Section 8(b)(1). That construction, we submit, emerges not only from the rulings in Allis-Chalmers and Marine Workers, but was the thrust of this Court's emphasis in International Association of Machinists v. Goncales, 356 U.S. 617, 620, that "the protection of union members in their rights as members from arbitrary conduct by unions and union officers has not been undertaken by federal law, and indeed [by the proviso to § 8(b)(1)(A)] the assertion of any such power has been expressly denied."

Conclusion

The Union by-law here in issue is justified from any point of view in the interest of the Union and its members, and does not infringe the statutory rights of the employer or the public. That is what the Board held in this case, and upon the record before this Court its ruling must be sustained.

It is respectfully submitted that the judgment of the Court of Appeals sustaining the Labor Board's Decision and Order should be affirmed.

Respectfully submitted,

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JOHN SILARD
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Washington, D.C. 20036
Washington Counsel,
United Automobile Workers.

STEPHEN I. SCHLOSSBERG 8000 East Jefferson Avenue Detroit, Michigan 48214 General Counsel, United Automobile Workers.

APPENDIX A.

PERCENT OF PRODUCTION AND RELATED WORKERS PAID ON INCENTIVE BASIS IN MACHINERY MANUFACTURING ESTABLISHMENTS, UNITED STATES AND REGIONS, MID-1966*

Type of incentive wage systems	United States	Eng-	Mid- dle At- lantic	Border States	South- east	South- west	Great Lakes	Mid- dle West	Moun- tain	Pa-	
All incentive workers Piecework systems Straight piecework—	16.5 6.1	26.4 11.0	15.7	21.8 5.6	9.8 5.5	4.4	17.5 8.3		3.7	1.7	
Individual	. 9		1.9	4.9	5.2	(1)	6.6	1.8	2.9	.i	
Individual	.5	21					.1			V	
Production bonus systems Workers earnings vary: In same proportion as output—	. 10.2	15.0	13.0	16.2	4.4	4.1	9.2	18.1	.8	1.7	
Individual Group Proportionately less		10.7 2.3	7.7	. 4		1.1		5.0	8	1.0	
than output— Individual Group Proportionately more	(1)	.7	1.0				2	.1			
than output— Individual Group	.1	.5	(1)			.9	(1)				
In proportions which differ at different levels of output— Individual						4					
Group		.6	(1)	7			1				

^{*} Taken from Table A1, p. 120, of "Industry Wage Survey, Machinery Manufacturing, Mid-1966," United States Department of Labor Bulletin No. 1563.

1 Less than 0.05 percent. (Because of rounding, sums of individual items may not equal totals.)

APPENDIX B

AGREEMENT

UNION CONTRACT CHANGES (1965)

The following revisions of the 1962 Agreement between Wisconsin Motor Corporation and Local 283 of the International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America (AFL-CIO) have been agreed upon by the representatives of the Company and the International and Local Union, to be incorporated into the new Agreement effective February 1, 1965.

(Nore: Underscoring is used below only to indicate the changes in language in the old provisions, and is not to be used in the final draft.)

Introduction: Except as agreed below, all other agreements and all provisions of the May 1, 1962 to February 1, 1965 Agreement shall remain unchanged and will be placed in their respective positions in the new Agreement.

The Union agrees to increase the Production Ceilings an additional 3¢.

The Union also agrees to sit down with Management within the next few weeks to work out some departmental problems existing in the Assembly areas.

All signed Agreements reached between Local 283-UAW and the Wisconsin Motor Corporation during the life of the May 1, 1962 to February 1, 1965 Agreement and listed in the original Local 283-UAW Proposal dated December 1, 1964 will be incorporated in the

new February 1, 1965 to February 1, 1968 Agreement under Clarifications and Interpretations and referred to by the parties as provided under Par. 59 Sec. 1 of the new Contract.

It was also agreed during these negotiations that a suitable East Entrance from the Plant #1 parking lot will be provided in addition to the main plant entrance from Burnham Street.

Dated: March 19, 1965

FOR THE COMPANY:

H. A. Todd, President

A. O. Olson, Industrial Relations Director,

A. H. LeSage, General Superintendent

D. A. Lukasik, Personnel Manager FOR THE UNION:

Peter Zagorski, President, Local 283, UAW

Dale L. Steinfeldt, Recording Sec'y,

Local 283 UAW R. E. Majerus,

Int'l Rep., Region 10 UAW Harvey Kitzman,

Director, Region 10 UAW

(6103-6)

SUPREME COURT OF THE UNITED STATES

No. 273.—OCTOBER TERM, 1968.

Russell Scofield et al., Petitioners,

National Labor Relations Board et al. On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[April 1, 1969.]

MR. JUSTICE WHITE delivered the opinion of the Court.

Half the production employees of the Wisconsin Motor Corporation are paid on a piecework or incentive basis. They and the other employees are represented by respondent union, which has had contractual relations with the company since 1937.1 In 1938 the union initiated a ceiling on the production for which its members would accept immediate piecework pay. This was done at first by gentlemen's agreement among the members, but since 1944 by union rule enforceable by fines and expulsion. As the rule functions now, members may produce as much-as they like each day, but may only draw pay up to the ceiling rate. The additional production cis "banked" by the company; that is, wages due for it are retained by the company and paid out to the employee for days on which the production ceiling has not been reached because of machine breakdown or for some other reason. If the member demands to be paid in full each pay period over the cailing rate the company will comply, T but the union assesses, a fine of \$1 for each violation, and in cases of repeated violation may fine the member . up to \$100 for "conduct unbecoming a union member."

¹ There is a union security clause in the current contract, giving each employee, after a 30-day waiting period, the option of becoming and remaining a member in good standing of the union, or of declining membership but paying the union a "service fee."

Failure to pay the fine may lead to expulsion. As the trial examiner found, the company's complaint is not and cannot be that "the employee, for the pay he receives, has not given the requisite quid pro quo in production." 145 N. L. R. B. 1097, 1120. Rather, the question is the extent to which the group will forgo for pay the rest periods it has bargained for, and the discipline which the union may invoke to achieve unity toward this end which, the trial examiner found, was "manifestly a matter affecting the interest of the group and in which its collective bargaining strength hinges upon the cooperation of its individual components."

The collective bargaining contract between employer and union defines a "machine rate" of hourly pay guaranteed to the employees. The piecework rate, as defined by the contract, is set at a level such that "the average competent operator working at a reasonable pace" [as determined by a time study] shall earn not less than the machine rate at his assigned task." Allowances are made in the time study for setting up machinery, cleaning tools, fatigue, and personal needs. By ignoring these allowances or by speed and efficiency it is possible for an industrious employee to produce faster than the machine rate. If he does so, he is entitled to additional pay. Union members, however, are subject to the banking procedures imposed by the union rule.

The margin between the "machine" rate set by the contract and the ceiling rate set by the union was 10¢ per hour in 1944. As a result of collective bargaining between company and union over both the machine and ceiling rates, the margin has been increased to between 45 and 50¢, depending on the skill level of the job. The

² There is also a "day rate," lower than the machine rate, which applies to periods in which the incentive worker has not been producing, or has produced some, through no fault of the company's. That rate is of no concern here.

company has regularly urged the union to abandon the ceiling and has never agreed to refuse employees immediate pay for work done over the ceiling. However, the parties have bargained over the ceiling rate and the company has extracted from the union promises to increase the ceiling rate. The company opens its work records to the union to permit them to check compliance with the ceiling; pays union stewards for time spent in this checking activity as legitimate union business; and banks money for union members complying with the rule. The ceiling rate is also used in computing piece rate increases and in settling grievances.

This case arose in 1961 when a random card check by the union showed that petitioners; among other union members, had exceeded the ceiling. The union membership imposed fines of \$50 to \$100, and a year's suspension from the union. Petitioners refused to pay the fines, and the union brought suit in state court to collect the fines as a matter of local contract law.3 Petitioners then initiated charges before the National Labor Relations Board, arguing that union enforcement of its rule through the collection of fines was an unfair labor practice. Petitioners asserted that their right to refrain from "concerted activities," National Labor Relations Act, § 7, 49 Stat. 452, as amended, 29 U. S. C. § 157, was impaired by the union's effort to "restrain or coerce" them, in violation of NLRA, §8 (b)(1)(A). The trial examiner, after extensive findings, concluded that there

Bulless the rule or its enforcement impinge on some policy of the federal labor law, the regulation of the relationship between union and employee is a contractual matter governed by local law. As the trial examiner put it in this case, the Board "never intended... to suggest that the disciplinary action in enforcement of [union] rules... were affirmatively protected under the Act, as opposed to merely being not violations thereof." It is thus a "federally unentered enclave" open to state law. 145 N. L. R. B., at 1133.

was no violation of the Act, and his findings and recommendations were adopted by the Board, 145 N. L. R. B. 1097 (1964), whose order was enforced by the Court of Appeals for the Seventh Circuit, 393 F. 2d 49 (1968). We affirm:

T.

We are met at the outset with the contention that the petition for certiorari was untimely filed: In civil suits certiorari must be applied for "within ninety days after the entry of [the] judgment or decree" of which review is sought. 28 U. S. C. § 2101 (c). In this case an opinion of March 5, 1968, concluded that "upon presentation an appropriate decree will be entered." A decree was in fact entered on April 16, 1968. The petition for certiorari was docketed here on July 6, 1968, within 90 days of the decree but not of the opinion.

In our view, the petition for certiorari was timely filed. Petitioners here received a copy of the March 5 opinion, but were given no notice of any entry of judgment on that date, as would be required by Rule 36 of the new Federal Rules of Appellate Procedure, effective July 1, 1968. Since no notice was given and it could not have been clear to petitioners whether there was a March 5 judgment or not we hold, without ahandoning the standard that a "judgment for our purposes is final when the issues are adjudged" and settled with finality, Market Street Railway Co. v. Railroad Commission, 324 U. S. 548, 551-552 (1945); FTC v. Minneapolis-Honeywell Regulator Co., 344 U. S. 206, 212 (1952), that in thiscase the relevant date is that of the entry of the decree. Cf. Rubber Co. v. Goodyear, 6 Wall. 153, 156 (1887).

II.

Section 8 (b)(1) makes it an unfair labor practice to "restrain or coerce (A) employees in the exercise of the rights guaranteed in [§ 7]: Provided, that this paragraph

shall not impair the right of a labor organization to operative its own rules with respect to the acquisition or retention of membership therein"

Based on the legislative history of the section, including its proviso, the Court in NLRB v. Allis-Chalmers Mfg. Co., 388 U. S. 175, 195 (1967), distinguished between internal and external enforcement of union rules and held that "Congress did not propose any limitations with respect to the internal affairs of unions, aside from barring enforcement of a union's internal regulations to affect a member's employment status." A union rule, duly adopted and not the arbitrary fist of a union. officer, forbidding the crossing of a picket line during a strike was therefore enforceable against voluntary union members by expulsion or a reasonable fine. The Court thus essentially accepted the position of the National Labor Relations Board dating from Minneapolis Star and Tribune Co., 109 N. L. R. B. 727 (1954) where the Board also distinguished internal from external enforcement in holding that a union could fine a member for violating a rule against working during a strike but that the same rule could not be enforced by causing the employer to exclude him from the work force or by affecting his seniority without triggering violations of §§ 8 (b)(1), 8(b)(2), 8(a)(1), 8(a)(2), and 8(a)(3). These sections form a web, of which §8(b)(1)(A) is only a strand, preventing the union from inducing the employer to use the emoluments of the job to enforce the union's rules.

The Board has long held that § 8 (b) (1) (A)'s legislative history requires a narrow construction which nevertheless proscribes unacceptable methods of union coercion, such as physical violence to induce employees to join the union or to join in a strike. In re Maritime Union, 78 N. L. R. B. 971, enforced 175 F. 2d 686 (C. A. 2d Cir. 1949).

⁵ The Court has held that the "policy of the Act is to insulate employees' jobs from their organizational rights." Radio Officers'

This interpretation of § 8 (b) (1), as the Court explained in Allis-Chalmers, 388 U.S., at 193-195, was reinforced by the Landrum-Griffin Act of 1959 which, although it dealt with the internal affairs of unions, including the procedures for imposing fines or expulsion, did not purport to overturn or modify the Board's interpretation of § 8 (b) (1). And it was this interpretation which the Board followed in Allis-Chalmers and in the case now before us.

Although the Board's construction of the section emphasizes the sanction imposed, rather than the rule itself, and does not involve the Board in judging the fairness or wisdom of particular union rules, it has become clear that if the rule invades or frustrates an overriding policy of the labor laws the rule may not be enforced, even by fine or expulsion, without violating § 8 (b)(1). In both Skura' and Marine Workers, the Board was concerned with union rules requiring a member to exhaust union

Union v. National Labor Relations Board, 347 U. S. 17, 40 (1954). As an employee, he may be a "good, bad, or indifferent" member so long as he meets the financial obligations of the union security contract. Thus the Board has found an unfair labor practice by union and employer where an employee was discharged for violation of a union rule limiting production. Prints Leather Co., 94 N. L. R. B. 1312 (1951). But as a union member, so long as he chooses to remain one, he is subject to union discipline.

As part of the bill of rights of union members, the Landrum-Griffin Act guaranteed freedom of speech and assembly "Provided, That nothing herein shall be construed to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution and to his refraining from conduct that would interfere with its performance of its legal or contractual obligations." P. L. 86-257, Tit. I, § 101 (a) (2), 73 Stat. 522, 29 U. S. C. § 411 (a) (2).

¹ Local 188, International Union of Operating Engineers, 148 N. L. R. B. 679 (1964).

⁸ Industrial Union of Marine and Shipbuilding Workers of America, 159 N. L. R, B. 1085 (1966).

remedies before filing an unfair labor practice chargewith the Board. That rule, in the Board's view, frustrated the enforcement scheme established by the statute and the union would commit an unfair labor practice by fining or expelling members who violated the rule.

The Marine Workers case came here and the result reached by the Board was sustained, the Court agreeing that the rule in question was contrary to the plain policy of the Act to keep employees completely free from coercion against making complaints to the Board. Frustrating this policy was beyond the legitimate interest of the labor organization, at least where the member's complaint concerned conduct of the employer as well as the union.

Under this dual approach, § 8 (b) (1) leaves a union free to enforce a properly adopted rule which reflects a legitimate union interest, impairs no policy Congress has imbedded in the labor laws, and is reasonably enforced against union members who are free to leave the union and escape the rule. This view of the statute must be applied here.

III.

In the case at hand, there is no showing in the record that the fines were unreasonable or the mere fiat of a union leader, or that the membership of petitioners in the union was involuntary. Moreover, the enforcement of the rule was not carried out through means unacceptable in themselves, such as violence or employer discrimination. It was enforced solely through the internal technique of union fines, collected by threat of expulsion or judicial action. The inquiry must therefore focus on the legitimacy of the union interest vindicated by the

^{*} National Labor Relations Board v. Industrial Union of Marine & Shipbuilding Workers, 391 U.S. 418 (1968).

rule and the extent to which any policy of the Act may be violated by the union-imposed production ceiling.

As both the trial examiner and the Court of Appeals noted, union opposition to unlimited piecework pay systems is historic. Union apprehension, not without foundation, is that such systems will drive up employee productivity and in turn create pressures to lower the piecework rate so that at the new, higher level of output employees are earning little more than they did before. The fear is that the competitive pressure generated will endanger workers' health, foment jealousies, and reduce the work force. In addition, the findings of the trial examiner were that the ceiling served as a vardstick for the settlement of job allowance grievances, that it has played an important role in negotiating the minimum hourly rate and that it is the standard for "factoring" the hourly rate raises into the piecework rate. The view of the trial examiner was that "[i]n terms of a union's traditional function of trying to serve the economic interests of the group as a whole, the union has a very real, immediate, and direct interest in it." 145 N. L. R. B., at 1135.

It is doubtless true that the union rule in question here affects the interests of all three participants in the labor-management relation: employer, employee, and union.¹⁰

¹⁰ The company prefers to employ the minimum number of the most energetic men available; a piecework pay scheme without a ceiling could help it obtain its objective of winnowing the men and reducing their piecework rate. Each employee, as well, has an interest in the ceiling. A slow worker would prefer a low ceiling to protect himself against invidious comparison with faster workers and a possible reduction of the work force beginning with him. A fast worker may prefer to earn as much as possible in a day and so desire a high ceiling or none at all. But all workers have an interest in maintaining a ceiling to the extent that it is necessary to prevent reductions in the piecework rate. The employer, and the union

Although the enforcement of the rule is handled as an internal union matter, the rule has and was intended to have an impact beyond the confines of the union organization. But as Allis-Chalmers and Marine Workers made clear, it does not follow from this that the enforcement of the rule violates § 8 (b)(1)(A), unless some impairment of a statutory labor policy can be shown.

The principal contention of the petitioner is that the rule impedes collective bargaining, a process nurtured in many ways by the Act. But surely this is not the case here. The union has never denied that the ceiling is a bargainable issue. It has never refused to bargain about it as far as this record shows. Indeed, the union has at various times agreed to raise its ceiling in return for an increase in the piece rate, and the ceiling has been regularly used to compute the new piece rate. In light of this bargaining history it can hardly be said that the union rule has removed this issue from the bargaining table. The company has repeatedly sought an agreement eliminating the piecework ceiling, an agreement which, had it been obtained, unquestionably would have been violated by the union rule. But the company could not attain this. Although, like the union, it could have pressed the point to impasse, Fibreboard Paper Products Corp. v. National Labor Relations Board, 379 U.S. 203. 209-215 (1964), followed by strike or lockout, it has never done so. Instead, it has signed contracts recognizing the ceiling, has tolerated it, and has cooperated in its admin-

⁽representing the group) may seek to vindicate their interests in bargaining. The individual member may express his interest within the union councils in determining what the group position shall be—and here the trial examiner found that the employees overwhelmingly approved of the ceiling—or through exercising the option of withdrawing from the union.

istration by honoring requests by employees to bank their pay for over-ceiling work. We discern no basis in the statutory policy encouraging collective bargaining for giving the employer a better bargain than he has been able to strike at the bargaining table.¹¹

Nor does the union ceiling itself or compliance with it by union members violate the collective contract. The company and the union have agreed to an incentive pay scale, but they have also established a guaranteed minimum or machine rate considerably below the union ceiling and defined in the contract as the rate of production of an average, efficient worker. The contract therefere leaves in the hands of the employee the option of taking full advantage of his allowances, performing only as an average employee and not reaching even the ceiling rate. At least there is nothing before us to indicate that the company disciplines individuals who work at only the machine rate or individuals who produce more but who choose not to exceed the union ceiling. The same decision can be made collectively by the union. Although it has agreed in the contract to a pay scale for production in excess of ceiling, that fact in the context of this case does not support an inference that the union has agreed not to impose the ceiling or that its action in announcing one is somehow contrary to the contract. And if neither union nor member is in breach of contract for establishing and adhering to the ceiling, it is equally clear that the rule neither causes nor invites a contract violation by the employer who stands ready to pay an employee for his over-ceiling production or to bank, it at his request.

¹¹ The trial examiner suggests that if the ceilings did not exist, the management might well invent them to serve its own purposes: maintaining careful work standards and a low scrap rate, and permitting the prediction of production output. 145 N. L. R. B., at 1119-1120.

Petitioner purports to characterize the union rule as featherbedding, but it is hard to square this with his collective agreement that an average, efficient employee produces at a "machine" rate substantially below the ceiling. Beyond that, however, Congress has addressed itself specifically to the problem of featherbedding in § 8 (b)(6), making it an unfair labor practice "to cause or attempt to cause an employer to pay or deliver or agree to pay or deliver any money or other thing of value, in the nature of an exaction, for services which are not performed or not to be performed 61 Stat. 142, 29 U.S. C. § 158 (b) (6). This narrow prohibition was enacted partly because the Congress found it difficult to define with more particularity just where the area between shiftlessness and over-work should lie.12 Since Congress has addressed itself to the problem specifically and left a broad area for private negotiation, there is no present occasion for the courts to interfere with private decision. Indeed, there is no claim before us that the rule violates § 8 (b) (6). If the company wants to require more work of its employees, let it strike a better bargain. The labor laws as presently drawn will not do so for it.

This leaves the possible argument that because the union has not successfully bargained for a contractual ceiling, it may not impose one on its own members, for doing so will discriminate between members and those others who are free to earn as much as the contract

¹² Senator Taft, co-sponsor of the bill and Chairman of the Senate Committee on Labor and Public Welfare stated on the floor of the Senate that to do more "would require a practical application of the law by the courts in hundreds of different industries, and a determination of facts which it seemed to me would be almost impossible." By contrast, he said, "we did accept one provision" which "seemed to be a fairly clear case, easy to determine" and narrow. 93 Cong. Rec. 6441.

permits. All members of the bargaining unit, however, have the same contractual rights. In dealing with the employer as bargaining agent, the union has accorded all employees uniform treatment. If members are prevented from taking advantage of their contractual rights bargained for all employees_it is because they have chosen to become and remain union members. In Allis-Chalmers, the union members were subject to the discipline of an internal rule which strengthened the union's hand in bargaining and in this respect benefited both the members who obeyed the rule and the nonmembers who did not. The same is true here, and the price of obeying the rule is not as high as in Allis-Chalmers. There the member could be replaced for his refusal to report to work during a strike; here he needs simply limit his production and suffer whatever consequences. that conduct may entail. If a member chooses not to gage in this concerted activity and is unable to prevail on the other members to change the rule, then he may leave the union and obtain whatever benefits in job advancement and extra pay may result from extra work. at the same time enjoying the protection from competition, the high piece rate, and the job security which compliance with the union rule by union members tends to promote. ..

That the choice to remain a member results in differences between union members and other employees raises no serious issue under §8 (b)(2) and §8 (a)(3) of the Act, because the union has not induced the employer to discriminate against the member but has merely forbidden the member to take advantage of benefits which the employer stands willing to confer. Those sections are not aimed at completely internal union discipline of union members, even though the discipline may result in the member's refusal to accept work offered by the employer. Allis-Chalmers makes this quite clear.

The union rule here left the collective bargaining process unimpaired, breached no collective contract, required no pay for unperformed services, induced no discrimination by the employer against any class of employees, and represents no dereliction by the union of its duty of fair representation. In light of this, and the acceptable manner in which the rule was enforced, vindicating a legitimate union interest, it is impossible to say that it contravened any policy of the Act.

We affirm, holding that the union rule is valid and that its enforcement by reasonable fines does not constitute the restraint or coercion proscribed by §8(b)(1)(A).

Affirmed.

MR. JUSTICE MARSHALL took no part in the consideration or decision of this case.



SUPREME COURT OF THE UNITED STATES

No. 273.—OCTOBER TERM, 1968.

Russell Scofield et al., Petitioners,

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National Labor Relations Board et al. On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[April 1, 1969.]

MR. JUSTICE BLACK, dissenting.

Because the union members collected from their employer extra pay for piece-work production in excess of that agreed upon by the union and the company, the union has tried the members, fined them, and suspended them from the union for one year. Section 8(b)(1) of the National Labor Relations Act makes it an unfair labor practice for a union to "restrain or coerce" employees in the exercise of their right under § 7 to refrain from any or all concerted activities. In this case the National Labor Relations Board held that the union did not commit an unfair labor practice in coercing employees through fines and suspensions from refusing to engage in this concerted activity. I dissent from affirming this order of the Board for the reasons set out at length in my dissenting opinion in NLRB v. Allis-Chalmers, 388 U.S. 175, 199 (1967).